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REPUBLIC OF THE PHILIPPINES

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THE OFFICIAL MONTH IN REVIEW

THE celebration of the first anniversary of the Republic of the Philippines was the most significant event of the month. It was featured by a grand parade representing different branches of the Government and various social and educational institutions.

At the grandstand on the historic Luneta, the President, after the colorful parade had passed in review before the dignitaries present, delivered his anniversary address to the nation. The whole Filipino nation reverently heard the solemn pronouncements of the President over the radio. The President declared that whatever the Republic of the Philippines has done in the first year of its existence was opened and subjected to criticism by some quarters. "We have not bartered away the smallest particle of that sovereignty for any material or other consideration," he said.

THE President was enthusiastically applauded by the crowd when, in the course of his speech, he mentioned the freedom of the press in the Philippines. "Our people," he said, "enjoy freedom of speech and of the press, in a measure unsurpassed in any other country of the world. Here, the press or any individual may indulge in the bitterest criticisms against the Government and its highest officials without fear and without sanction."

(*See full text of the President's address under* "HISTORICAL PAPERS AND DOCUMENTS" *in this issue.*)

THE delivery of 84 ships of the United States Navy to the Republic of the Philippines was featured by simple ceremonies aboard the Minesweeper No. 281 on July 9. These ships will form the nucleus of the future Philippine Navy.

PRESIDENT Manuel Roxas attended the ceremony accompanied by the members of his cabinet together with President Avelino of the Senate. Admiral H. H. Good, in behalf of the U. S. Navy, said that to an insular nation like the Philippines a naval patrol is necessary. "Navies are not all for war. Their peacetime mission is to mount guard and to further the ideals of liberty, independence, justice, and democracy."

PRESIDENT Roxas requested Nathaniel P. Davis, Charge d'Affaires of the U. S. Embassy, to transmit to President Truman the gratitude of the Philippine Government and people for the transfer of the ships.

VICE-PRESIDENT Elpidio Quirino arrived in the afternoon of July 15 from his world-circling tour. He was received warmly and was given a most elaborate welcome by high officials of the Government and social dignitaries despite the bad weather. Amidst the jubilant reception of his countrymen, the Vice-President said: "I had to leave the country to reaffirm my faith in our future." President Roxas welcomed the home-coming Vice-President.

The next day a State Dinner was given in his honor by the President at Malacañan. The guest list included the Vice-President, the Senate President, the Chief Justice of the Supreme Court, members of the Cabinet, members of the Committee on Foreign Affairs of both houses of Congress, and accredited diplomatic representatives in the Philippines.

ON July 20 President Manuel Roxas held a long conference with Charles W. Lee, manager of the Philippine Consolidated Shipyards, and officers of the Shipyards Workers' Union, to help iron out the differences resulting from the strike of the Engineer Island laborers. The 3,600 Engineer Island workers came to Malacañan

to present their problem to the President. The Chief Executive told the officials of the Workers' Union that the U. S. Army was sympathetic with the laborers and that the Philippine Government had the utmost desire to help the laborers who were thrown out of work, but that it would be difficult to find immediate work for 3,600 men.

The President counseled the workers to have faith in the Philippine Government and in the U. S. Army and assured them that as materials became available, the unemployed would be given work in government construction projects.

THE National Convention of the Liberal Party was held in the gymnasium of the University of Santo Tomas where the party leaders heard President Manuel Roxas. The President did not fail to recognize that "men and women have equal opportunities in the public service and [that he] shall not permit the female sex to be barred from holding any public office."

He called the attention of the delegates to the fact that this was the first time that any political party in the Philippines or perhaps in the world had given such recognition to women. This was in connection with the nomination of a lady candidate for the senatorial race. He made also emphatic his belief that the country needed a loyal opposition, just as it needed a strong majority.

In view of the extremely long proceedings attendant to the nominations for senatorial candidates of the majority party, the President was not able to deliver his speech until 1:04 that day.

PRESIDENT Roxas sent a radiogram to President Truman expressing his sympathy upon the death of President Truman's mother.

President Roxas' message follows: "Allow me, in behalf of my people, my family and my own, to express the deepest sympathy upon the passing of your beloved mother. We share the grief of every man for the loss of the good mother of a great statesman, an outstanding world leader, and a true American. We pray to God to receive her in His bosom."

EXECUTIVE ORDERS, PROCLAMATIONS AND ADMINISTRATIVE ORDERS

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 63

REDUCING THE APPROPRIATION "FOR SALARIES AND OTHER EXPENSES OF ADVISERS AND CONSULTANTS IN FOREIGN AFFAIRS" AUTHORIZED IN REPUBLIC ACT NO. 80, ITEM D–IV–3, FROM ₱50,000 TO ₱30,000, AND ALLOTTING THE AMOUNT OF ₱20,000 FOR A FUND TO BE EXPENDED IN THE DISCRETION OF THE SECRETARY OF FOREIGN AFFAIRS.

By virtue of the powers vested in me by Republic Act No. 51, I, Manuel Roxas, President of the Philippines, do hereby order—

1. The appropriation of ₱50,000 "for salaries and other expenses of advisers and consultants in foreign affairs," authorized in Republic Act No. 80, item D–IV–3, is reduced from ₱50,000 to ₱30,000;

2. The amount of ₱20,000 which is available from the said reduction is alloted for the following item:

"For a fund to be expended in the discretion of the Secretary of Foreign Affairs, including representation and other expenses in connection with the quartering, accommodation and entertainment of foreign delegations, dignitaries and diplomatic representatives ..... ₱20,000.00"

3. This order shall take effect as of April 16, 1947.

Done at the City of Manila, this 24th day of June, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the first.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 64

FURTHER AMENDING EXECUTIVE ORDER NO. 304, DATED OCTOBER 8, 1940, AS AMENDED BY EXECUTIVE ORDER NO. 26, DATED NOVEMBER 15, 1946, CREATING INVESTIGATING COMMITTEES ON VETERANS' PENSIONS.

Pursuant to the powers vested in me by law, I, Manuel Roxas, President of the Philippines, do hereby further amend paragraph one of Executive Order No. 304, dated October 8, 1940, as amended by Executive Order No. 26, dated November 15, 1946, by adding at the end of said paragraph the following proviso:

"*Provided, however,* That the per diems and traveling expenses that may be incurred by the members of the Investigating Committees in connection with their work as such shall be paid from the funds from which their respective salaries are being paid."

Done at the City of Manila, this 24th day of June, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the first.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 65

PERMITTING LIMITED EXPORTATION OF LOGS AND FLITCHES SUBJECT TO CERTAIN CONDITIONS

By virtue of the powers vested in me by the Constitution and laws of the Philippines, I, Manuel Roxas, President of the Philippines, do hereby order that effective July 15, 1947, logs and flitches may be exported from the Philippines in accordance with the following rules and regulations:

1. Export license for logs and flitches may be issued only to actual producers thereof.

2. Any actual producer of logs and flitches may export not more than 20 per cent of his actually produced and marketed product during the previous month, which exportable 20 per cent shall consist only of veneer or peeler logs Nos. 1 and 2, and flitches with thickness and width of not less than 8 inches.

3. In addition to the above quota for each actual producer, a timber producer-exporter may also be licensed to export the amount of logs and/or flitches sufficient to pay for milling and logging machinery actually purchased and imported by him or to his order and for his own use, after the date of this Order, upon presentation of shipping documents showing that such machinery has actually been shipped.

4. Any logger or miller, or producer of logs and/or flitches found violating any of the foregoing conditions and requirements shall be deprived of his export license.

5. All exportation of logs and flitches shall be covered by export license duly issued by the Philippine Sugar Administration in accordance with the provisions of Executive Order No. 3, dated July 10, 1946, as amended by Executive Order No. 23, dated November 1, 1946, upon recommendation of the Director of Forestry.

6. Executive Order No. 3, dated July 10, 1946, and Executive Order No. 13, dated August 26, 1946, are hereby modified accordingly.

7. This Order shall take effect on July 15, 1947.

Done at the City of Manila, this 27th day of June, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the first.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 66

FIXING NEW CEILING PRICES OF LUMBER AND FOR OTHER PURPOSES

Whereas, the public interest requires that a new and reasonable schedule of ceiling prices be established and

fixed for lumber in view of changed conditions and circumstances;

NOW, THEREFORE, I, Manuel Roxas, President of the Philippines, by virtue of the powers vested in me by the Constitution and existing laws of the Philippines, do hereby order;

SECTION 1. The following Philippine wood species shall not be sold at retail at more than the maximum price set opposite each:

CEILING PRICES PER 1,000 BOARD FEET COMMERCIAL SIZES

Kind of lumber	Rough sawn lumber	Dressed or finished lumber
First Group:		
Molave	₱800.00	₱850.00
Narra	780.00	815.00
Dao	640.00	675.00
Ipil	600.00	650.00
Yakal	550.00	600.00
Guijo	420.00	470.00
All other first group	400.00	435.00
Second Group:		
Red Lauan and Tanguili	260.00	290.00
Apitong and Palosapis	250.00	285.00
All other second group	270.00	300.00
Third Group:		
Almon, Bagtikan, White Lauan and all other third group	240.00	270.00
Fourth Group:		
All fourth group	200.00	230.00

SEC. 2. Any retailer or vendor of lumber who refuses to sell any of the wood species specified in section 1 hereof, displayed in his lumber yard or place of business, at the price fixed by this Order shall be punished in accordance with the provisions of section 3 of Commonwealth Act No. 600, as amended.

SEC. 3. All retailers or vendors of lumber are hereby reqiured to post in a conspicuous place at the entrance of their lumber yards or places of business, or within said premises, a copy of the schedule of prices provided in this Order.

SEC. 4. All Executive Orders and all Emergency Control Administration Orders or any of the provisions thereof which are in conflict or inconsistent with this Order or any of its provisions are hereby repealed.

SEC. 5. This Executive Order shall take effect July 15, 1947.

Done at the City of Manila, this 27th day of June, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the first.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

EXECUTIVE ORDER NO. 67

ORGANIZING CERTAIN PORTIONS OF THE BARRIOS OF SAN ISIDRO AND BUGSOC, MUNICIPALITY OF SIERRA BULLONES, PROVINCE OF BOHOL, INTO AN INDEPENDENT BARRIO UNDER THE NAME OF LA UNION.

Upon the recommendation of the Secretary of the Interior and pursuant to the provisions of section 68 of the Revised Administrative Code, the portions of the barrios of San Isidro and Bugsoc of the municipality of Sierra-Bullones, Province of Bohol, the boundaries of which are more particularly described as follows:

> Beginning with M.B.M. No. 2, P.L.D.–5 of Sierra Bullones, N. 26° 30′ E., 370 m. to M.B.M. No. 3; thence No. 26° 30′ E., 990 m. to M.B.M. No. 4; then N. 38° 30′ E., 620 m. to OS tree; thence from OS tree S. 5° 00′ E., 600 m. to Bogtong Cauayan; thence from Bogtong Cauayan S. 1° 30′ E., 980 m. to B.B.M. No. 10; thence from B.B.M. No. 10 running southward along the road to Cauayan Grove (Hill); thence from Cauayan Grove (Hill) S. 48° 00′ W., 390 to Lusbac (Hill); thence from Lusbac (Hill) S. 69° 30′ W., 1,080 m. to Darol Post (Hill); thence from Darol Post (Hill) running in a northwesterly direction approximately 500 m. to Baleroc Tree; thence from Baleroc Tree running in a northwesterly direction following the course of Laboc River to M.B.M. No. 2, the point of beginning.

are hereby organized into an independent barrio under the name of La Union.

The organization herein made shall take effect immediately.

Done at the City of Manila, this 12th day of July, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the second.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION No. 27

RESERVING FOR NAVAL PURPOSES A PARCEL OF THE PUBLIC DOMAIN SITUATED IN THE DISTRICT OF MALATE, CITY OF MANILA.

Upon recommendation of the Secretary of Agriculture and Commerce and pursuant to the provisions of section 83 of Commonwealth Act No. 141, as amended, I hereby withdraw from sale or settlement and reserve for naval purposes under the administration of the Army of the Philippines, subject to private rights, if any there be, the following parcel of the public domain, situated in the District of Malate, City of Manila, to wit:

A parcel of land (lot 4 of plan Swo–18580), situated in the District of Malate, City of Manila; Bounded on the NE., by Yacht Basin, Dewey Boulevard and lot 3 of plan Swo–18580; on the SE., by Manila Bay; on the SW., by Manila Bay; and on the NW., by Manila Bay, Yacht Basin and Dewey Boulevard. Beginning at a point marked "1" on plan, being N. 58° 11′ W., 528 meters from C. B. M. 2, City of Manila; thence S. 23° 16′ E., 182.98 m. to point "2"; thence S. 60° 27′ W., 501.77 m. to point "3"; thence N. 29° 28′ W., 458.32 m. to point "4"; thence N. 61° 06′ E., 326.14 m. to point "5"; thence S. 59° 47′ E., 264.42 m. to point "6"; thence N. 61° 07′ E., 31.32 m. to point "7"; thence S. 29° 14′ E., 45.19 m. to point "8"; thence No. 58° 05′ E., 30.83 m. to the point of beginning; containing an area of two hundred five thousand one hundred and seven square meters and ninety square decimeters (205,107.90) more or less. All points referred to are indicated on the plan and are marked on the ground as follows: points "3," "4" and "5" by crosses in rock on breakwater, points "6" and "7" by G. I. S. on Retaining Wall, point "8" by nail on adobe stone and the rest by B. L. Cyl. Conc. Mons.; bearings true; declination variable; date of survey, Nov. 5–6 and Dec. 2–3, 1946 and that of the approval, May 9, 1947.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done at the City of Manila, this 27th day of June, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the first.

[SEAL] MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION No. 28

MAKING PUBLIC THE DECLARATION ON THE PART OF THE REPUBLIC OF THE PHILIPPINES RECOGNIZING AS COMPULSORY *IPSO FACTO* THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE IN ALL DISPUTES MENTIONED IN PARAGRAPH 2, ARTICLE 36 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.

WHEREAS, the Government of the Republic of the Philippines, as a signatory to the Charter of the United Nations Organization, has also subscribed to the Statute of the International Court of Justice;

WHEREAS, article 36 of the Statute provides as follows:

"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

"2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

"*a.* the interpretation of a treaty;

"*b.* any question of international law;

"*c.* the existence of any fact which, if established, would constitute a breach of an international obligation;

"*d.* The nature or extent of the reparation to be made for the breach of an international obligation.

"3. The declarations referred to above may be made unconditional or on condition of reciprocity on the part of several or certain states, or for a certain time.

"4. Such declaration shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

"5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

"6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

WHEREAS, the President of the Philippines, having seen and considered the aforesaid provision of the International Court of Justice, proposed to make a declaration on behalf of the Republic of the Philippines in accordance therewith;

WHEREAS, the Senate of the Republic of the Philippines by its Resolution No. 33 of May 22, 1947, did concur in the above proposal of the President of the Philippines;

WHEREAS, the President of the Philippines, having secured the concurrence of the Senate of the Philippines in accordance with constitutional procedure, made a declaration that the Republic of the Philippines recognizes as compulsory *ipso facto*, and without special agreement in relation to any other state accepting the same obligation, and on condition of reciprocity, the jurisdiction of the International Court of Justice in all disputes mentioned in paragraph 2, Article 36 of the Statute, for a period of ten years from July fourth, nineteen hundred and forty-six, and thereafter to continue until notification of abrogation is made by the Philippine Government;

NOW, THEREFORE, be it known that I, Manuel Roxas, President of the Philippines, do hereby proclaim and make public the declaration of the President of the Philippines to the end that the same and every clause thereof may be observed and fulfilled with good faith by the Republic of the Philippines and the citizens thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done at the City of Manila, Philippines, this 12th day of July, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the second.

[SEAL]

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

PROCLAMATION No. 29

RESERVING AS "SPECIAL FOREST FOR GOVERNMENT LUMBER PRODUCTION PURPOSES" A PARCEL OF LAND SITUATED IN THE MUNICIPALITIES OF BUTUAN AND BUENAVISTA AND MUNICIPAL DISTRICTS OF LAS NIEVES, REMEDIOS, MILAGROS, CONCORDIA, ESPERANZA, GUADALUPE, SANTA INES, SAN LUIS, MAMPINSAHAN, VERDU, MAYGATASAN AND NUEVO SIBAGAT, PROVINCE OF AGUSAN, ISLAND OF MINDANAO.

Upon the recommendation of the Secretary of Agriculture and Commerce, and pursuant to the provision of section 64(*d*) of Act Numbered Twenty-seven hundred and eleven, known as the Revised Administrative Code, I, Manuel Roxas, President of the Philippines, do hereby reserve as "Special Forest for Government Lumber Production Purposes" to be undertaken by the National Development Company the following parcel of land containing forest in the public domain situated in the municipalities of Butuan and Buenavista and Municipal Districts of Las Nieves, Remedios, Milagros, Concordia, Esperanza, Guadalupe, Santa Ines, San Luis, Mampinsahan, Verdu, Maygatasan and Nuevo Sibagat, Province of Agusan, to wit:

Beginning at point 1, which is the mouth of Baug River, which is approximately 8,000 meters N. 17° W. from BLIM No. 1 Butuan, Agusan; thence following Baug River upstream in a general northeasterly direction about 1,300 meters to point 2 which is the junction of Baug and Bansa Rivers; thence following Bansa, Maycasina, Tagibo and Pianing Rivers upstream in a general southeasterly then easterly direction about 23,000 meters to point 3 which is the source of Pianing River; thence S. 45° E. about 5,800 meters to point 4 at Uaua River; thence S. 17° 30' E. about 27,200 meters to point 5 which is the source of Labao River; thence following Labao River downstream in a general southwesterly direction about 19,000 meters to point 6 which is the junction of Lavao and Agusan Rivers; thence following Agusan River upstream in a general southeasterly direction about 28,500 meters to point 7 which is the junction of Agusan and Maasam Rivers; thence following Maasam River upstream in a general southwesterly direction about 21,000 meters to point 8 at the same Maasam River; thence N. 30° W. about 23,200 meters to point 9 which is the junction of Ojot River and Agsab Creek; thence in a northerly direction about 7,500 meters to point 10 which is the source of Lingayao River; thence following Lingayao River downstream in a general northeasterly direction about 12,800 meters to point 11 at the same Lingayao River; thence in a northerly direction to point

12 which is the source of Danapa Creek; thence following Danapa Creek downstream in a northeasterly direction about 3,500 meters to point 13 which is the junction of Danapa Creek with Agusan River; thence following the Agusan River downstream in a general northerly direction about 6,300 meters to point 14 which is the junction of Agusan and Bugabus Rivers; thence following Bugabus River and Caliitan Creek upstream in a northwesterly then southwesterly direction about 27,000 meters to point 15 which is the source of Caliitan Creek; thence in a northeasterly direction to point 16 which is the source of Tamutao Diver; thence following Tamutao and Buenavista Rivers downstream in a northeasterly direction about 17,500 meters to point 17 which is the mouth of the Buenavista River; thence following the coast line in an east-northeasterly direction about 14,800 meters to point 1, the point of beginning, containing an approximate area of 165,000 hectares.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

Done at the City of Manila, this 29th day of July, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the second.

[SEAL]

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

ADMINISTRATIVE ORDER NO. 38

CREATING A REAL PROPERTY BOARD TO ATTEND TO PROBLEMS INVOLVING REAL ESTATE IN CONNECTION WITH THE PLANNING OF THE CITY OF MANILA.

For the purpose of attending to the various problems involving private real estate arising from the formulation and execution of the planning of the City of Manila by the National Urban Planning Commission, there is hereby created a Real Property Board to be composed of three members who shall be appointed by the President. The Chairman of the Board shall be chosen from the Office of the Assessor of the City of Manila; one member from the Bureau of Lands and the remaining member from the Manila Realty Board. There shall be among the members of the Board a lawyer possessing sufficient knowledge and expe-

rience in matters pertaining to real estate. The Board shall have the following functions:

1. To gather all available data relative to lands of the public or private domain of the National Government and those of the City of Manila, including actually abandoned rights-of-way of existing streets and those proposed to be abandoned, which lands may be exchanged with privately owned lots needed for public purposes in connection with the planning of the City of Manila;

2. To gather the existing assessed values and to ascertain the market values of such government-owned lands as are mentioned in the next preceding paragraph hereof, and to consider all factors affecting the proper appraisal of the lots proposed to be exchanged or to be purchased;

3. To conduct the necessary negotiations leading to the acquisition of privately owned lands by exchange or purchase, and to recommend, through the National Urban Planning Commission, to the President the expropriation of any of such lands when all efforts at extra-judicial acquisition thereof fail.

The Committee is hereby empowered to call upon any department, bureau, office, dependency, agency or instrumentality of the Government for such assistance, data and information as it may need in carrying out its functions. For this purpose, it shall have access to, and the right to examine, the books, documents, papers or records thereof, as well as the books, documents, papers or records of such private party, firm, corporation, business house or enterprise as may be affected by, or interested in, the exchange, expropriation, purchase and sale of any private land in connection with the execution of the planning of the City of Manila.

The Committee shall proceed at once in accordance with the provisions of this Order and shall submit to the National Urban Planning Commission a report of its work from time to time, or as the circumstances of each case may require.

Done at the City of Manila, this 12th day of July, nineteen hundred and forty-seven, and of the Independence of the Philippines, the second.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

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MALACAÑAN PALACE
MANILA

BY THE PRESIDENT OF THE PHILIPPINES

ADMINISTRATIVE ORDER NO. 39

AMENDING PARAGRAPH 4 OF ADMINISTRATIVE ORDER NO. 41, DATED JUNE 17, 1946, ENTITLED "CREATING THE PHILIPPINE COMMITTEE OF FOOD AND AGRICULTURE."

The fourth paragraph of Administrative Order No. 41, dated June 17, 1946, is hereby amended to read as follows:

"The Philippine Committee of Food and Agriculture shall be composed of a Chairman and an Executive Secretary, to be appointed by the President; a representative each on crop production, livestock production, forestry, fisheries, agricultural engineering and soil conservation, to be designated by the Secretary of Agriculture and Commerce; a representative on irrigation, to be designated by the Secretary of Public Works and Communications; a representative on human nutrition, to be designated by the Secretary of Health and Public Welfare; a representative each on food utilization, animal nutrition, and economics of agriculture, to be designated by the President of the University of the Philippines; and two representatives of the Philippine Farmers Association."

Done at the City of Manila, this 12th day of July, in the year of Our Lord, nineteen hundred and forty-seven, and of the Independence of the Philippines, the second.

MANUEL ROXAS
President of the Philippines

By the President:

EMILIO ABELLO
Chief of the Executive Office

DEPARTMENT AND BUREAU ADMINISTRATIVE ORDERS AND REGULATIONS

DEPARTMENT OF THE INTERIOR

PROVINCIAL CIRCULAR (Unnumbered)

August 18, 1947

INFORMATION BULLETIN OF THE UNITED STATES PHILIPPINE WAR DAMAGE COMMISSION IN CONNECTION WITH THE FILING OF CLAIMS.

To all Provincial Governors and City Mayors:

Quoted hereunder is Information Bulletin of the United States Philippine War Damage Commission, dated August 14, 1947, for immediate transmittal to the municipal authorities, who should give it the widest possible publicity:

INFORMATION BULLETIN

"Six of the twelve months allowed for the filing of claims before the United States Philippine War Damage Commission have passed. The six remaining months end at midnight, February 29, 1948. No claims can be received after that time.

"Figures of the Philippine War Damage Commission show that during the first six months, only about one-third of the estimated number of persons entitled to file damage claims had filed them.

"The Commission urges that all persons entitled to file claims do so as soon as convenient. By doing this, claimants will avoid any rush at the last minute and will not risk the loss of their right to file.

"Claims generally are being processed in the order in which they are received. Several thousand have already been settled, and payments made. More are being settled every day. The basic requirements for filing a war damage claim are:

1. Secure the necessary forms from your local school. Read carefully the instructions contained in the Circular of General Information. Fill out your forms carefully, answering all questions which relate to your claim in full detail. Such questions must be answered. Where claim is presented for house or land or both, claimant must complete all questions under Part II of the claim form. If claim is for house and claimant is not owner of the land upon which house was built, be sure to show the name and address of landowner.

2. In order to be eligible to receive payment for war losses or war damage, your losses or damage must have occurred between December 7, 1941 and October 1, 1945, and must have been the result of one of the causes of perils listed in the Circular of General Information claimants receive when they get their claim forms.

3. Claims can only be paid for losses of property, crops or articles which were owned by the claimant on or before December 7, 1941. Losses for property acquired after that date cannot be paid. The United States Congress stated in the law that the Commission would not pay for losses for property acquired after December, 1941 because, while it knew that there were many people in the Philippines who bought property for their own use after that date, there were others who bought it and traded with the Japanese. The Congress did not want these "buy-and-sell" people to receive any of the money it felt should be paid to bona-fide war sufferers. Therefore, the Commission must refuse to pay any claims for losses on property acquired after December 7, 1941. Crops actually in growth on December 7, even though they were not harvested until later, however, can be claimed for if they were lost or damaged as the result of the war.

"The Commission urges every eligible person who has not yet filed to give attention to his war damage claim. The limit for filing CANNOT BE EXTENDED, except by Act of the Congress of the United States."

MARCIANO ROQUE
Undersecretary of the Interior

DEPARTMENT OF JUSTICE

ADMINISTRATIVE ORDER No. 310

June 24, 1947

ADMINISTRATIVE ORDER NO. 310, AUTHORIZING JUDGE CLEMENTINO V. DIEZ, TO HOLD COURT IN CERTAIN MUNICIPALITIES IN THE PROVINCE OF LEYTE.

In the interest of the administration of justice, the Hon. Clementino V. Diez, Judge of the Second Branch, Twenty-first Judicial District, is hereby authorized to hold court during the month of August, 1947, in the municipality of Cabalian, Province of Leyte, for the purpose of trying cases coming from

said municipality and the municipalities of Pintuyan, Liloan, Anahawan, Hinundayan and Hinunangan, same province, and to enter final judgments therein.

ROMAN OZAETA
Secretary of Justice

ADMINISTRATIVE ORDER NO. 311

June 24, 1947

ADMINISTRATIVE ORDER NO. 311, DESIGNATING THE PROVINCIAL FISCAL OF DAVAO AS REPRESENTATIVE OF THE DEPARTMENT OF JUSTICE TO INVESTIGATE COMPLAINTS AGAINST LAND EMPLOYEES IN DAVAO.

In pursuance of the resolution of the Cabinet in its meeting held on March 26, 1947, Mr. Bernardo Teves, Provincial Fiscal of Davao, is hereby designated representative of the Department of Justice to look into the various complaints against the employees of the Bureau of Lands in Davao, with a view to bringing about a more effective enforcement of the rights of the Government over cancelled and expired leases. Mr. Teves shall conduct the investigation of these complaints in conjunction with the representative of the Department of Agriculture and Commerce.

ROMAN OZAETA
Secretary of Justice

ADMINISTRATIVE ORDER NO. 313

June 27, 1947

ADMINISTRATIVE ORDER NO. 313, AUTHORIZING JUDGE EDUARDO B. ENRIQUEZ TO HOLD COURT IN TANDOG, SURIGAO.

In the interest of the administration of justice, the Hon. Eduardo B. Enriquez, Judge-at-Large, is hereby authorized to hold court in the municipality of Tandag, Surigao, during the month of August, 1947, and in the municipality of Cantilan, same province, during the month of September, 1947, for the purpose of trying all kinds of cases and to enter final judgments therein.

ROMAN OZAETA
Secretary of Justice

DECISIONS OF THE SUPREME COURT

[No. L-145. September 7, 1946]

TERESA FANLO DE PEYER ET AL., plaintiffs and appellees, *vs.* R. C. PEYER, defendant and appellant

1. HUSBAND AND WIFE; SUPPORT; ATTEMPT AGAINST LIFE OF HUSBAND; RECONCILIATION; CASE AT BAR.—Under the facts stated in the opinion, the Court held that there was no attempt by the wife against the life of her husband and that, at any rate, there had been reconciliation after the incident which occurred on June 19, 1942.
2. ID.; ID.; ACTION FOR SUPPORT; OBLIGATION OF HUSBAND TO PAY ATTORNEY'S FEES, NATURE OF.—Appellant's liability to pay attorney's fees is not based on any contractual relation. It is part of his legal obligation to support his wife and children. It is an incidental expense, similar to judicial costs, in the enforcement of the legal right of the wife and children to be supported.
3. EVIDENCE; OBLIGATION OF HUSBAND TO PAY ATTORNEY'S FEES IN ACTION FOR SUPPORT; WRITTEN CONTRACT UNNECESSARY; ARTICLE 1280 OF CIVIL CODE, SUPERSEDED BY RULES ON EVIDENCE.—No written agreement is necessary to prove plaintiffs' obligation to pay their attorney's fees, even if the amount involved be higher than three hundred pesos. Article 1280 of the Civil Code is not applicable, because it refers to cases wherein the existence of a contract is in issue, and being of procedural nature must be considered superseded by the present rules on evidence. Plaintiffs do not need to prove the existence of any contract on attorney's fees. It is enough that the legal services, as well as their nature, extent, and such other facts and circumstances be shown so as to enable the court to determine the reasonable amount that must be awarded.

APPEAL from a judgment of the Court of First Instance of Manila. Dizon, J.

The facts are stated in the opinion of the court.

Ross, Selph, Carrascoso & Janda for appellant.
Camus, Zavalla, Bautista & Nuevas for appellees.

PERFECTO, *J.:*

On May 10, 1945, plaintiff and her three daughters filed a complaint for alimony against her husband, praying for ₱500 monthly allowance from February, 1945, for counsel's fees, for confirmation of her custody of the children, for the amount of ₱3,000 to redeem plaintiff's jewels, for the delivery of a Buick automobile and reasonable rental for the use of said car, and for damages in the sum of ₱10,000, plus costs.

On September 28, 1945, the lower court rendered judgment the dispositive part of which reads as follows:

"In view of all the foregoing, judgment is hereby rendered as follows:

"On the first cause of action, the defendant is hereby sentenced to pay the plaintiffs as monthly support, and until further orders from this court, the sum of three hundred fifty pesos (₱350) commencing from March 1, 1945, the same to be payable within the first five days of each and every month. Whatever amounts have been paid by the defendant to the plaintiffs heretofore as support *pendente lite* pursuant to their agreement of June 22, 1945, attached to the record shall be deducted accordingly.

"The defendant is further sentenced to pay plaintiffs' counsel, as professional fees due for their services in connection with this case, the sum of ₱1,500.

"The custody given to Mrs. Peyer of her coplaintiffs is hereby confirmed.

"On the third cause of action, the defendant is hereby ordered to return to his wife, the plaintiff Teresa Fanlo de Peyer, the Buick sedan mentioned heretofore, in good and undamaged condition, otherwise to pay for the cost of whatever repair may be required to put it in running condition.

"The cross-claims of the defendant are hereby dismissed.

"No special pronouncement as to costs."

Defendant appealed from said judgment, assigning in his brief eight errors alleged to have been committed by the lower court.

Defendant admits his obligation to support his daughters, plaintiffs Elizabeth and Ruth, but disclaims any obligation to support his wife and his eldest daughter, Alice Peyer. In this appeal, we need not decide the question concerning the support of Alice, the parties having agreed that the case be dismissed with respect to her, as she married in March, 1946. As a consequence, appellant's second assignment of error need not be considered.

The main question in this case is whether, upon the evidence, plaintiff Teresa Fanlo had attempted against her husband's life on June 19, 1942, and lastly on June 1, 1945.

Appellant alleges that, for said attempts, he is relieved from the obligation to support his wife under paragraph 4 of article 152 and paragraph 4 of article 855 of the Civil Code, which read as follows:

"ART. 152. The obligation to give support shall cease:

* * * * * * *

"4. When the recipient, whether a forced heir or not, commits any of the offenses which constitutes sufficient grounds for disinheritance."

"ART. 855. In addition to those mentioned in paragraphs 2, 3, and 6 of article 756, the following shall also be sufficient causes for disinheriting a spouse:

* * * * * * *

"4. An attempt against the life of the spouse making the will, should there not have been a reconciliation."

Regarding the alleged attempt on June 19, 1942, defendant testified that "at that time she had a knife in her hand while we were having a quarrel and I had to run around the table to avoid serious consequence and the others intervened taking the knife away from her." Plaintiff pursued me "but she could not catch me; she followed me around the table with the knife * * * but what she did was that she hit the knife on the table, the knife cut the table." After the attempt, no reconciliation took place between wife and husband.

Concerning the same incident, plaintiff testified: "I remember I was also sick at that time and I overhead his conversation with someone, and I went out and told him, If you do not stop insulting me or my family, I shall hit you with this.' The only thing I did was to hit the table with the knife. I did not strike him." Asked whether she pursued him around the table, she answered: "I do not remember, may be I did, may be I did not, but I did not hit him; it was such a long time already."

Regarding the alleged attempt on June 1, 1945, Jesus Santiago, Jesus P. Sans, and Zoilo Tasio testified.

Jesus Santiago testified that "Mrs. Peyer went away and when she came back I saw her making a movement to stab Mr. Peyer on the back with a knife. I then parried the stab and got hold of her hand."

Jesus P. Sans testified that "I saw Jesus Santiago trying to disarm Mrs. Peyer who was holding a knife in her hand. Then I held her at the back and said: 'For God's sake, leave that knife,' and I tried to disarm her and I was wounded in the chin; I was able to get the knife from her hand."

Zoilo Tasio testified that "I saw her (Mrs. Peyer) raise her hand, but the timekeeper who was between her and Mr. Peyer, held the hand of Mrs. Peyer who was holding the knife. The timekeeper is the same Jesus Santiago. If Mrs. Peyer had not been held by our foreman, she could have stabbed Mr. Peyer. Mr. Peyer was stooping and were it not for the intervention of our foreman Mrs. Peyer could have stabbed Mr. Peyer on the back."

Exhibit 1 was identified as the knife which Sans took from Mrs. Peyer.

Plaintiff Teresa Fanlo, after relating the struggle she had with defendant, testified: "The only answer I received was with closed fist, he gave me a big blow on my right breast, so strong that my ribs started to ache, and I almost fainted. When I saw I was defenseless and very weak, I ran upstairs to the kitchen and took a kitchen knife. It was really not a kitchen knife because our kitchen knife was taken by his men when Mr. Peyer left the house to work for the company in April. So when I came down, I was

met by Jesus Santiago, who caught my hand and tried to snatch the knife away from me. When I saw that the blade was hurting my right hand, I let it go." When Jesus Santiago succeeded in taking the knife from her hand, she was about three meters from Mr. Peyer. Plaintiff denies having actually stabbed Mr. Peyer. "The only thing I did when I took the knife was to try, in case Mr. Peyer would hit me again, to repel him."

Concerning the incident which occurred on June 19, 1942, plaintiff and defendant gave contradicting testimonies. Under the circumstances, the court is not in a position to give credence to either of the spouses, and is more inclined to believe that in said incident plaintiff had not in fact attempted against defendant's life. At any rate, the court is of opinion that after said incident a sort of reconciliation, which defendant denies, took place between the spouses, they having continued to live under the same roof, and defendant having continued giving support to plaintiff, although there were frequent disagreements on this regard.

Concerning the second incident, the writer of this decision is of opinion that the preponderance of evidence militates in favor of defendant, but the majority, constituting all the other members of the division, agree with the lower court's pronouncement to the effect that the evidence adduced by the defendant does not establish the fact that his wife intended to kill him, but only armed herself with the knife to prevent defendant and his laborers from taking away the foodstuff and goods stored in the basement of the conjugal house, and that plaintiff acted, in a sort of self-protection, by trying to secure the retention of said foodstuff and other goods to satisfy her and her daughters' necessities, an understandable attitude, considering the differences between them regarding plaintiffs' support, differences which more than three weeks before had culminated in the filing of the complaint in this case.

Appellant complains because the lower court confirmed the custody that plaintiff Teresa Fanlo had of her daughters Elizabeth and Ruth, defendant's ground being that his wife is not a fit person to have said custody in view of her two alleged attempts against his life, and that Elizabeth has not attended any school since December, 1941, and practically every night she stays up as late as 1 o'colck in the morning and Ruth is not taken to bed until 10 or 11 o'clock at night.

It is not necessary to repeat what we have said relative to the alleged attempts against defendant's life. As regards the other grounds, we believe them not enough to make the mother unfit to have the custody of the two minors. Elizabeth's not going to school may be explained by the difficulties obtaining during enemy occupation, when plaintiffs, accord-

ing to their complaint, were not sufficiently provided for by defendant for their support. Besides, if defendant had serious doubts as to his wife's fitness to have the custody of their daughters, no explanation has been given by defendant of his inaction to deprive his wife of said custody before he was sued in this case.

The sum of ₱1,500 awarded by the lower court for attorney's fees of plaintiffs is impugned by defendant because (*a*) the complaint was filed by Atty. Vicente J. Francisco, who withdrew from the case, and there is a total lack of evidence that Teresa Fanlo entered into an agreement with her attorneys regarding their fees; (*b*) plaintiff Teresa Fanlo's testimony to the effect that she agreed with Mr. Gonzales, who prepared the complaint in Attorney Francisco's office, to pay the sum of ₱2,000 as attorney's fees, and that Mr. Francisco fixed everything with Judge Camus of the firm, is not admissible in evidence under paragraph 6 or article 1280 of the Civil Code; and (*c*) the amount is exorbitant.

Appellant's liability to pay attorney's fees is not based on any contractual relation. It is part of his legal obligation to support his wife and children. It is an incidental expense, similar to judicial costs, in the enforcement of the legal right of the wife and children to be supported. (Mercado *vs.* Ostrand, 37 Phil., 179; Arroyo *vs.* Vasquez, 42 Phil., 54.) And even if it were considered contractual, it is still obligatory no matter what the form of its execution may be, according to article 1278 of the Civil Code.

No written agreement is necessary to prove plaintiff's obligation to pay their attorney's fees, even if the amount involved be higher than three hundred pesos. Said article 1280 is not applicable, because it refers to cases wherein the existence of a contract is in issue, and being of procedural nature must be considered superseded by the present rules on evidence. Plaintiffs do not need to prove the existence of any contract on attorney's fees. It is enough that the legal services, as well as their nature, extent, and such other facts and circumstances be shown so as to enable the court to determine the reasonable amount that must be awarded. The lower court which conducted the trial of this case was in a good position to appraise the reasonable attorney's fees that must be awarded, and there is no showing that the amount awarded should be disturbed.

With respect to the Buick automobile, appellant maintains that the lower court erred in not holding that he is the owner thereof.

Plaintiff Teresa Fanlo testified that the car was given to her as a Christmas present in 1930 and, as she was denied the use of the car by all kinds of excuses, a stipulation

regarding it was included in the agreement of April 27, 1944. Defendant points out that he acquired the car only in 1934, as shown by the certificate of registration (Exhibit 2).

Upon the evidence, we are convinced that, because defendant had two automobiles, one a De Sotto and the other the Buick in question, defendant in fact bought the Buick for the use of his family and the De Sotto for his business, and it is only reasonable that the possession of the Buick car be given to plaintiffs. We do not believe it reasonable for defendant to acquire two automobiles for his sole personal use to the exclusion of his wife and children. The lower court's pronouncement that plaintiff Teresa Fanlo is entitled to the ownership of the Buick car is, therefore, not correct, because the car belongs to the conjugal partnership and consequently to both spouses. There must be distinction between ownership and use and possession.

Defendant's claim in the amount of ₱2,830 for the use of sundry goods and merchandise belonging to the Philippine Manufacturing Company, taken by plaintiff Teresa Fanlo from the basement of the conjugal house and for which defendant was responsible, is groundless. Neither the quantity of goods taken nor their value was proved. The goods were purchased by defendant himself, which might make them as part of the conjugal assets. Plaintiffs were dependent upon those goods for their subsistence. Defendant is not certain how much the Philippine Manufacturing Company would claim for said goods, and the company has not as yet attempted to collect their value. At any rate, if the Philippine Manufacturing Company is entitled to claim the amount in question, it is the company, not the defendant, which has the personality to use for the amount.

Modified with the exclusion of plaintiff Alice Peyer, the judgment of the lower court is affirmed, with costs against appellant.

Parás, Pablo, Hilado, and *Padilla, JJ.,* concur.

Judgment modified.

[No. L–782. September 17, 1946]

VICTORIANO ENRIQUEZ, petitioner, *vs.* BENEDICTO PADILLA and ALFONSO FELIX, Judge of First Instance of Manila, respondents.

APPEAL; JUDGEMENT ON COMPROMISE, NOT APPEALABLE; EXCEPTION.—A judgment on compromise is not appealable and is immediately executory unless a motion is filed to set aside the compromise on the ground of fraud, mistake or duress, in which event an appeal may be taken from the order denying the motion.

ORIGINAL ACTION in the Supreme Court. *Mandamus.*

The facts are stated in the opinion of the court.

Ferrera & Manahan, Jr., for petitioner.
Padilla, Carlos & Fernando for respondents.

TUASON, *J.*:

This is a petition for mandamus to have the Honorable Alfonso Felix, Judge of the Court of First Instance of Manila, certify and approve the record on appeal in civil case No. 71066 of that court.

It appears that in the early part of December, 1941, the petitioner was given by Benedicto Padilla, one of the respondents, an option to buy a house and lot situated at No. 23 Tangab, Santa Mesa Heights Subdivision, Quezon City, for ₱8,000. The prospective purchaser did not exercise this option within the prescribed period; he sought to do so in 1945, after liberation of Manila. When the owner refused to execute a deed of sale on the ground that the period of option had expired, suit was brought on August 16, 1945.

During the pendency of the action, Andres Concepcion, Deputy Clerk, in an undated notice summoned the attorneys and their clients for a conference with the Judge who was taking cognizance of the case, on February 27, 1946, in his chamber, for an amicable settlement of the case. The parties and their respective attorneys having appeared on the designated date, proposals and counter-proposals were made, as a result of which Judge Felix rendered a decision of the following tenor:

"After this case had been submitted for decision, the parties, assisted by their respective attorneys, appeared and informed the court that they have come to an understanding and entered into the following agreement:

"1. That the defendant Benedicto Padilla shall give, as he does give, the plaintiff an opportunity to purchase from him lot No. 6, block No. 166, of the Sta. Mesa Heights Subdivision, of an area of 240 square meters, together with the improvements existing thereon, more particularly described in transfer certificate of title No. 1711 of the Register of Deeds of Quezon City (Exhibit 4) and located at No. 23 Tangab, Santa Mesa Heights, Quezon City, at a price to be determined later in the manner hereinafter prescribed;

"2. That, in consideration of this attitude of the defendant, the parties to this case have agreed that a commission of assessors be appointed by the court to *appraise and determine the actual and reasonable market price* of the property mentioned in the preceding No. 1, and for this purpose they suggest the names of the following real estate brokers to compose said commission, to wit:

"Mr. Federico Calero
"Mr. Macario Arabejo
"Mr. M. S. Balatbat
"Mr. Pedro R. Revilla
"Mr. Cipriano Gonzales

"3. That these commissioners, separately and independently, shall immediately proceed to assess said porperty and to submit their assesment in writing and under oath to this court not later than 30 days from the date of this decision;

"4. That for the services rendered by said commissioners they be requested to accept a compensation of ₱100 each, or ₱500 in all, the same to be apportioned by the parties in equal amount, and to meet this expense both plaintiff and defendant bind themselves to deposit with the Clerk of this court, within ten (10) days from the date of this decision, the sum of ₱250 each;

"5. That in the event that any of the commissioners should decline to accept the appointment, the parties shall immediately suggest to the court the names of other real estate brokers that might substitute and take the place of the commissioner who shall refuse to assist the parties and the Court in this case;

"6. That on the basis of the appraisals submitted by the commissioners and of the reasons given in their support, the court shall determine and fix the reasonable actual market value that the plaintiff shall have to pay as purchase price of said property, which decision shall be final and binding upon the parties;

"7. That the parties thus fixed by the court shall be final, unappealable and binding upon the parties to this case;

"8. That, within 15 days from the receipt by the parties of the valuation made by the Court of the property in question, the defendant shall execute the corresponding deed of sale and conveyance of said property in favor of the plaintiff, who within the same period of 15 days and upon the execution of said deed shall fully pay to the defendant in cash the price fixed by the Court for the property;

"9. That the sum of ₱2,000 paid by the plaintiff in 1941 for the option granted him by the defendant and the sum of ₱200 recently delivered by the plaintiff to the defendant shall be applied to the payment of rents and said property from December 1, 1941, up to the date of its acquisition of said property, at the monthly rental of ₱80, with the exception of the period of the japanese occupation of Manila (January of 1942 to January of 1945, inclusive), in which the rent shall be of ₱40, and the period from November 1, 1945, up to the time of the execution by the defendant of said deed of sale, in which the rent shall be the monthly sum of ₱192, equivalent to ½ of 20 per cent of the assessed value of the property, which is ₱11,520;

"10. That as the sum of ₱2,200 referred to in the preceding paragraph is only sufficient to pay the rates of rents agreed upon up to September 30, 1945, the plaintiff shall pay to the defendant, not later than March 15, 1946, the sum of ₱848 as rents due for the last quarter of 1945 and for January and February of 1946, and shall continue to pay the monthly rent of ₱192 for March and succeeding months of this year (up to the date of his acquisition of the property), within the first ten (10) days of the month following that for which the rent shall become due and payable;

"11. That the provisions of paragraphs 9 and 10 hereof shall be complied with even in the case that plaintiff shall fail to purchase said defendant's property;

"12. That if, upon knowing the value of the property as fixed by this court, the plaintiff shall be unwilling or unable to pay for the purchase price thereof, then the plaintiff shall waive any right that he may have to purchase defendant's property and *shall vacate the premises within three months* from the date that, in accordance with the provisions of paragraph 8 hereof, he should

have purchased said property, unless the parties herein should enter into another lease agreement for the same;

13. That the rent of said property for the period of three months referred to in the preceding paragraph shall be the same sum of ₱192 monthly, payable in the same manner as provided for in paragraph 10 hereof;

"14. That in case the plaintiff shall fail to purchase the property in question, then the defendant shall pay to the plaintiff the sum of ₱500 for the grills placed by the latter in said premises;

"15. That the plaintiff does not claim to have any other improvement made in the premises;

"16. That both parties waive their right to appeal this case to the higher court; and

"17. That the parties submit this agreement for approval of the court and pray that judgment be rendered in accordance with the terms thereof.

"Wherefore, the court hereby approves the preceding agreement and, as prayed for, renders judgment in accordance with the terms thereof, without special pronouncement as to costs."

The five real estate brokers who had been appointed in line with the above decision submitted separate and independent reports of appraisal on different dates from March 14 to April 1, inclusive, 1946, and the respondent Judge on April 13 promulgated a supplementary decision which reads as follows:

"The Commissioners on Appraisal have already submitted their assessment of the market value of the property involved in this case, located at No. 23 Tangab, Santa Mesa Heights, Quezon City, covered by transfer certificate of title No. 1711 (Exhibit 4) of the Register of Deeds of Quezon City. The respective valuations made by the Commissioners of said lot, building and improvements thereon are as follows:

1. Mr. Federico Calero	₱12,000.00
2. Mr. Macario Arabejo	16,000.00
3. Mr. M. S. Balatbat	24,000.00
4. Mr. Pedro A. Revilla	19,000.00
5. Mr. Cipriano Gonzales	16,000.00

"Considering the grounds on which the respective valuations are made by the Commissioners and that Messrs. Arabejo and Gonzales coincide in the amount of ₱17,000; that the basis for their valuation is sound; and considering further the reasons adduced by Commissioners Calero and Revilla, and based on the average of the valuations submitted that practically gives the same result, the court, in conformity with the provisions of paragraphs 6 and 7 of the agreement of the parties embodied in the decision rendered in this case, hereby declares that the present and reasonable market value of the property in question is ₱16,000.

"Wherefore, let the parties comply with the provisions of paragraph 8 of their agreement as incorporated in said decision."

It is the appeal from these decisions that the respondent Judge refused to allow, on the ground that they are unappealable by the terms of the parties' agreement.

We have held that "a judgment on compromise is not appealable and is immediately executory unless a motion

is filed to set aside the compromise on the ground of fraud, mistake or duress, in which event an appeal may be taken from the order denying the motion." (De los Reyes *vs.* Ugarte, 42 Off. Gaz., 489; *see also* 2 Amer. Juris., 975.)

The pertinent parts of the petition are paragraphs V and VI which read as follows:

"That then and there, the respondent Judge called one of his stenographers and begun dictating a series of stipulations; after which dictation, the herein petitioner left the court in the belief that he would be furnished with a copy of the said stipulations for revision and whatever suggestion he might propose for the consideration of the said court and the adverse party to be incorporated in the proposed agreement;

"That contrary to his expectation, the respondent Judge rendered a decision dated February 27, 1946, based on the stipulations he had dictated to his stenographer without giving this representation an opportunity to revise or propose any amendment thereto and for this reason, this representation filed a motion for reconsideration on April 1, 1946, containing the suggestions he desired to propose as a part of the said stipulations; that he had not been furnished with a copy of said stipulations; and had not in fact agreed to some of the conditions stated therein."

The main question presented to us for decision has to do with the truth or falsity of these allegations. It is entirely a question of fact.

The petitioner has attached to his petition only a copy of the notice of the deputy clerk of court above referred to. Among other papers lacking, copies of the motions for reconsideration and the court's orders denying them, which we would be curious to know and which might shed some light on the question at issue, are conspicuous by their absence. The copies of the decisions which have been transcribed herein have been furnished not by the petitioner but by the respondents.

Under ordinary circumstances, we should be inclined to refer the matter to a commissioner for reception of evidence on the disputed facts. However, the petitioner has not made enough showing to warrant such procedure. In fact, the petitioner has not only failed to make a *prima facie* case but some of his averments carry their own refutation or appear upon their face to be untenable.

There is no allegation in the petition denying the correctness of the passages in paragraphs 6 and 7 of the main decision, namely, that the parties had agreed that "the court shall determine and fix the reasonable actual market value that the plaintiff shall have to pay as purchase price of said property, which decision shall be final and binding upon the parties," and that "the price thus fixed by the court shall be final, unappealable and binding upon the parties to this case." We also gather from a reading of the petition an implied admission that a stipulation of facts

to be embodied in the said decision was in truth made. And in impugning the decision, the petitioner does not now specify the parts thereof to which he says he did not agree. What he does is to make a general statement that he "had not in fact agreed to some of the conditions stated therein." But not even such unspecific imputation of errors appears to have been placed by him before the Judge who had signed the decision. Paragraph VII of the petition states that a motion for reconsideration was presented "containing suggestions and proposals to be incorporated in the proposed agreement. * * *"

The petitioner says that the Judge "began dictating a series of stipulations," after which he left Judge Felix's private chamber "in the belief that he would be furnished with a copy of said stipulations for revision and whatever suggestion he might propose for the consideration of the said court and the adverse party to be incorporated in the proposed agreement."

We are unable to believe this statement; it is illogical, contrary to what a normal person in petitioner's position would have done. Being vitally interested in the proceeding that was going on, it would have been unnatural for him to walk away before the proceeding was over or a definite understanding had been reached. It must be remembered at this juncture that the law was against the plaintiff in the main case, although he might have some equity on his side, and that the Judge endeavored to prevail upon the defendant Padilla to sell the questioned property to said plaintiff with a modification of some of the terms, primarily for his (petitioner's) benefit. Quite apart from all this, the presiding Judge, after having exerted efforts to have the parties come to an agreement could hardly have allowed the petitioner to leave the conference before a settlement had been concluded or before every hope for such a settlement had been given up. The insinuation that the Judge permitted the petitioner to quit the conference and agreed to send him a copy of the decison for him to muse and meditate upon, without setting a time within which the petitioner should make up his mind, does not seem plausible.

That the decision was the result of a definite and final agreement between the parties without reserving to either of them the right to retrocede or propose changes is borne out by the deposit by the petitioner of ₱250 representing one-half of the compensation to be paid the appraisers in accordance with paragraph 4 of the said decision. Proofs leading to the same result are the allegations in the answer of the respondents, not denied by the petitioner in his reply, that "under paragraph 9 (of the decision) petitioner inserted the sum of ₱200 which he had recently delivered to respondent owner," that "in paragraph 14 petitioner in-

serted the sum of ₱500 as the value of the grills he had placed on the premises," and that one of the commissioners was named by him.

The petitioner's reaction to the decision did not tie up with his assertion that it includes onerous conditions and terms to which he did not give his assent. We notice that he received a copy of the decision on March 12, according to his reply to the respondent's answer, if indeed he did not learn of it earlier. Yet he did not move, as far as his petition would show, until April 11 (he says April 1 in his petition)—a lapse of 29 days—when he filed a motion for reconsideration. And, as has been stated before, that motion for reconsideration did not appear to have pointed out any misstatements or inaccuracies in the decision; it was limited to proposing new matters for incorporation into the decision.

The most charitable view to take of the petitioner's case is that he was disappointed at the appraisals made by the real estate brokers and not because of any omission from the decision of essential particulars of the stipulations or inclusion therein of unapproved details. We are supported in this belief by the length of time it took the petitioner to file his first motion for reconsideration; by the fact that it was filed only after the submission of the last report of the appraisers, and by the fact that in another motion he suggested the appointment of a new set of appraisers to be composed of the city engineer, the city auditor and the city assessor, in lieu of the real estate brokers who had already finished the work entrusted to them, impeaching the technical qualifications of the latter, although, as above seen, one of them was of his own selection and he had contributed one-half of the money which had been paid them as compensation.

It is unnecessary to decide whether the appeal was filed within or without the period provided by the Rules of Court, in view of the foregoing conclusion.

The petition is dismissed with costs against the petitioner.

Moran, C. J., Parás, Feria, Pablo, Perfecto, Hilado, Bengzon, and *Briones, JJ.,* concur.

Petition dismissed.

[No. L-529. September 18, 1946]

JOSE C. VILLANUEVA, plaintiff and appellee, *vs.* JUAN CANLAS, defendant and appellant

1. LEASE; TERM IN ABSENCE OF AGREEMENT; RENEWAL.—No period of time having been agreed upon in the verbal contract of lease as the facts of the case show, the duration of the contract must, according to the Civil Code, be on a month to month basis, that

is, terminating at the end of each month, but being renewed the next month by tacit agreement, and so successively until one of the parties refuses to continue the tacit renewals.

2. ID.; COMMONWEALTH ACT NO. 689, NOT RETROACTIVE.—Commonwealth Act No. 689 was enacted on October 15, 1945, about two months after plaintiff's cause of action had arisen. Since said act is not retroactive, as defendant's counsel himself admitted, it is not applicable in this case.

3. ID.; TERMINATION; NOTICE NOT NECESSARY.—A lease ceases upon the expiration of its term without the necessity of any notice to the tenant who thenceforth becomes a deforciant.

APPEAL from a judgment of the Court of First Instance of Manila. Ocampo, J.

The facts are stated in the opinion of the court.

Iturralde & Tuazon for appellant.
Francisco Villanueva, Jr. for appellee.

PERFECTO, *J.*:

Defendant is occupying the house at 596 Isabel, Sampaloc, Manila, at a monthly rental of ₱100, payable in advance during the first five days of each calendar month. Plaintiff, in a complaint filed in the Municipal Court of Manila on August 15, 1945, seeking the restitution of the property, alleged that defendant failed to pay the rents for the months of July and August, 1945, that plaintiff needs the premises for his personal use, that defendant had been requested several times to vacate the premises, the last request having been made in writing on August 8, 1945, and that defendant even threatened to do bodily harm to plaintiff if he is forced to vacate the property.

On August 22, 1945, the municipal court rendered decision ordering the defendant to vacate the premises and to pay rents from July 1, 1945, at the rate of ₱100 a month and costs. On November 29, 1945, Judge Buenaventura Ocampo, of the Court of First Instance of Manila, on appeal, rendered decision affirming the decision of the municipal court.

Defendant alleges that the reason of plaintiff in ousting him from the premises in question is plaintiff's desire to charge an unlawful and unconscionable rent; that defendant's ouster, in view of the present grave shortage of housing facilities, will be tantamount to casting him and his family to the streets; and that the contract of lease has not yet expired.

Upon the evidence, the lower court has found that plaintiff and defendant entered into a verbal contract of lease concerning the premises in question on the basis of a monthly rental of ₱100, payable within the first five days of each calendar month, and that in July, 1945, plaintiff requested defendant to vacate the property because plaintiff needed

it for him and his family, as they are occupying temporarily a room in the house of plaintiff's mother at Legarda Street. By reason of defendant's refusal to vacate the property, plaintiff approached his attorney who, on August 8, 1945, wrote to defendant the latter Exhibit A, asking him to vacate the house within five days.

No period of time having been agreed upon in the verbal contract of lease as the facts of the case show, the duration of the contract must, according to the Civil Code, be on a month to month basis that is, terminating at the end of each month, but being renewed the next month by tacit agreement, and so successively until one of the parties refuses to continue the tacit renewals. This is the case when plaintiff required defendant to vacate the premises in July, 1945.

In his brief, appellant maintains that the lower court erred in not applying Commonwealth Act No. 689, in finding him delinquent in the payment of rentals, in holding that there was a demand made upon him to vacate the premises, and in finding that plaintiff needs the premises.

Commonwealth Act No. 689 was enacted on October 15, 1945, about two months after plaintiff's cause of action had arisen. Since said act is not retroactive, as defendant's counsel himself admitted, it is not applicable in this case.

The question whether or not demand was made upon defendant to vacate the premises is immaterial, although the evidence shows that plaintiff did really make such a demand. "A lease ceases upon the expiration of its term without the necessity of any notice to the tenant who thenceforth becomes a deforciant." (Co Tiamco *vs.* Diaz, L–7, 42 Off. Gaz., 1169.) "The lease shall terminate without necessity of a special notice, upon the expiration of the term." (Vda. de Buhay *vs.* Cobarrubias, L–43, 42 Off. Gaz., 2428.)

Whether or not defendant had been delinquent in the payment of rentals and plaintiff needs the premises, although the record appears to support plaintiff's contention, are of no consequence after we have arrived at the conclusion that the duration of the verbal lease contract between plaintiff and defendant was monthly, according to article 1581 of the Civil Code. There could be no implied renewal of the lease contract after July, 1945, under article 1566 of said Code, because in that month the lessor gave the lessee notice to vacate.

We are not unmindful of defendant's plea that the City of Manila is faced by an acute shortage of housing facilities and that his ouster will be tantamount to casting him and his family into the streets. We can not close our eyes to the stark realities of the prevailing situation, deplorable after effects of the last war. But defendant's plea does not raise a legal question within the proper cognizance of tribu-

nals. It rather raises a political question or points out a social evil that may be exposed, borrowing an image from Rizal, at the steps of the temple, and whose solution or remedy can and should be afforded by the political departments of government. The burden of such solution or remedy lies primarily on the shoulders of Congress, the policy-making agency of the State. Congress enacted in 1945 Commonwealth Act No. 689, and it seems satisfied with that legislation for the time being. If defendant feels that, under the existing legislation, which this court has no other alternative but to apply and enforce, he is a victim of a political or social injustice, the Constitution opens the doors for him to petition Congress for proper legislative remedy.

The lower court's decision is affirmed, with costs against appellant.

Parás, Pablo, Hilado, and *Padilla, JJ.*, concur.

Judgment affirmed.

[No. L-321. September 19, 1946]

ELISA R. VDA. DE TUAZON, plaintiff and appellee, *vs.* CRISTETA JIMENA DE JAVELLANA ET AL., defendants and appellants.

LEASE; TERM IN ABSENCE OF AGREEMENT; RIGHT OF LESSOR TO TERMINATE.—As no definite period of duration was agreed upon in the contract of lease, it appearing that defendants are paying rents on a monthly basis, plaintiff is, under the Civil Code, entitled to terminate the contract at any given month by requiring defendants to vacate the premises, which she did before filing the complaint.

APPEAL from a judgment of the Court of First Instance of Manila. De la Rosa, J.

The facts are stated in the opinion of the court.

Quesada & Barbin for appellants.

Endencia & Endencia for appellee.

PERFECTO, *J.*:

During the battles for the liberation of Manila, plaintiff lost by fire her residential house at Sampaloc, Manila. The house was burned due to the shelling by the Japanese. Plaintiff moved to the house of Jose Cruz at Metrica Street, where she remained from February 12 to April 16, 1945.

Defendants, who were occupying the second floor of the house at Quezon Blvd. No. 546, as plaintiff's tenants on a monthly rent of ₱88, were requested by plaintiff to vacate the premises because the latter needs it for her residence. Defendants refused, and plaintiff had to live in the clinic of

her son, Dr. Juan Tuazon, in the ground floor of the same building at Quezon Blvd., where there is no enough space for seven persons—plaintiff, her son, her daughter-in-law, one niece, one cousin, and two servants—to live in.

Defendants were requested to vacate the upper floor in question not only verbally but also in writing through Exhibits A and A–1. Upon defendants' refusal to vacate the place, complaint for ejectment was filed in the municipal court of Manila on July 24, 1945.

On August 11, 1945, the municipal court rendered decision as prayed for in the complaint. On August 25, a motion for reconsideration was filed. Instead of simply denying the motion the municipal court rendered again on September 5 another decision as prayed for in the complaint.

On November 28, 1945, Judge Mariano L. de la Rosa, of the Court of First Instance of Manila, on appeal, rendered decision ordering defendants to vacate the upper floor of house No. 546 of Quezon Blvd. and to pay rents at the rate of ₱88 a month, plus costs.

Defendants again appealed. We do not find any merit in the appeal. The closest scrutiny of appellants' brief does not disclose any legal ground to support it.

Appellants insist that appellee has not shown that she needs the premises. Taking aside the fact that Doctor Tuazon's testimony appears enough to disprove appellants' contention, the same can not anyhow affect the legal issue in this case, that is, whether plaintiff is entitled or not to recover the possession of the property.

As no definite period of duration was agreed upon in the contract of lease, it appearing that defendants are paying rents on a monthly basis, plaintiff is, under the Civil Code, entitled to terminate the contract at any given month by requiring defendants to vacate the premises, which she did before filing the complaint. (Articles 1581 and 1566, Civil Code; Villanueva *vs.* Canlas, L–529.)

The lower court's decision is affirmed, with costs against appellants.

Parás, Pablo, Hilado, and *Padilla, JJ.,* concur.

Judgment affirmed.

[No. L–199. Septiembre 25, 1946]

AMPARO C. VDA. DE ORDOÑEZ, demandante y apelada, *contra* MÁXIMO ANGKIANGCO (*alias* MAX JOLLY), demandado y apelante.

ARRENDAMIENTO; DURACIÓN; FALTA DE CONVENIO EXPRESO.—Si no hay convenio expreso sobre la duración del arrendamiento, se entiende por mes cuando el alquiler es mensual, y "en todo caso cesa el arrendamiento, sin necesidad de requerimiento especial, cumplido el término."

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Manila, Díaz, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

D. Pedro Guevara en representación del apelante.
Sres. McClure & Salas en representación de la apelada.

PABLO, *M.:*

El demandado ocupó la casa No. 408 de la calle España, Manila desde el febrero de 1942 mediante un alquiler mensual de ₱20 (50 por ciento del alquiler antes de la invasión), pagadero dentro de los primeros cinco días del mes, bajo un contrato verbal de arrendamiento sin duración convenida entre las partes.

La demandante por tres veces notificó al demandado que desaloje la finca porque la necesitaba: 1.ª en marzo, 1945 por medio de Consuelo Casimiro;" 2.ª en abril, 1945 por medio del Dr. Ordoñez y últimamente en junio 1,ª 1945 por medio de una carta (Exhíbit A)."

Porque el demandado no prestó atención a los repetidos requerimientos, la demandante presentó la demanda correspondiente en el Juzgado Municipal de Manila en julio 2, 1945. Contra una sentencia adversa, el demandado apeló para ante el Juzgado de Primera Instancia, el cual, después de la vista correspondiente, dictó una sentencia contra él condenándole a desalojar la finca, pagar los alquileres mensuales de ₱50 desde julio, 1945 y las costas. Apeló.

La cantidad de ₱50 como alquiler mensual no ha sido impugnada como errónea en el alegato del apelante.

Si no hay convenio expreso sobre la duración del arrendamiento, se entiende por mes cuando el alquiler es mensual, y "en todo caso cesa el arrendamiento, sin necesidad de requerimiento especial, cumplido el término." (Artículo 1581, Cód. Civ.)

Por notificación expresa hecha en tres ocasiones, el arrendamiento del demandado terminó en 30 de junio de 1945. No podía ya legalmente continuar ocupando la finca. No erró el Juzgado *a quo* al condenarle que desaloje la finca.

La contención del demandado de que no se le puede exigir judicialmente el pago de los alquileres correspondientes a los meses de diciembre de 1944 y enero de 1945, está bién fundada. La orden de *moratorium* así dispone. (Cruz *contra* Avila, G. R. No. L–72, 42 Gac. Of., 2114, promulgada en febrero 14, 1946 y De la Fuente *contra* Borromeo, G. R.

No. L–131, 42 Gac. Of., 3172, promulgada en marzo 30, 1946.)

Se confirma le sentencia apelada con costas.

Parás, Perfecto, Hilado, y *Padilla, MM.,* están conformes.

Se confirma la sentencia.

[No. L–545. September 25, 1946]

LORENZO Y. COLOSO, petitioner and appellee, *vs.* FRANCISCO ALTEA, respondent and appellant

1. PUBLIC OFFICERS; PROVINCIAL FISCAL; WHO MAY APPOINT.—Only the President has the power to appoint a "permanent" provincial fiscal; but the Secretary of Justice may appoint an "acting" provincial fiscal in accordance with the last sentence of section 1679 of the Revised Administrative Code, as amended.
2. ID.; VACANCY IN PUBLIC OFFICE; MEANING OF.—In the eyes of the law, a public office is vacant when it is not filled by a *de jure* incumbent.

APPEAL from a judgment of the Court of First Instance of Cotabato. Mañalac, J.

The facts are stated in the opinion of the court.

Francisco Altea in his own behalf.
Lorenzo Y. Coloso in his own behalf.

BENGZON, *J.:*

A. *The case.* About the end of last year, the parties herein disputed, before the court of Cotabato, the right to act as fiscal of the province. Petitioner Lorenzo Y. Coloso claimed under an appointment dated October 8, 1945 by the Secretary of Justice. Respondent Francisco Altea exhibited two successive appointments by the United States military authorities, the last of which had been issued on June 12, 1945.

After hearing both sides, the Honorable Anatalio C. Mañalac, Judge, found for the petitioner, and ordered his opponent to surrender the office with all its records and equipment.

B. *The facts.* On January 9, 1945, respondent Francisco Altea was "temporarily appointed acting provincial fiscal for the Province of Cotabato" by the Director of Civil Affairs, Province of Cotabato, Tenth Military District, the appointment to be "valid for the duration of the present emergency, unless sooner revoked by proper authority." (Exhibit 3.) He qualified and acted as such. Upon assumption by the X Corps of command over the area, he was again designated on June 12, 1945, temporary fiscal, to "serve until removed by authority of appropriate commanders or superseded by acting or permanent offi-

cials appointed by the Commonwealth Government." The designation read:

"HEADQUARTERS X CORPS

"OFFICE OF THE COMMANDING GENERAL
"APO 310

"12 June 1945

"Subject: Appointments of Temporary Officials
"To: See Distribution

"1. The following named persons are hereby designated as temporary officials of the Province of Cotabato, Cotabato, Mindanao, Philippine Islands, effective 9 June 1945, pursuant to the provisions of paragraph 4, USAFFE Circular No. 7, Civil Administration and Relief of the Philippines, dated January 1945.

"* * * * * * *

"Provincial Board	JOSE L. GUERRERO
	BLAS SINSUAT
"Assistant Treasurer	QUERICO MOYA
"Fiscal	FRANCISCO ALTEA

"* * * * * * *

"2. All temporary appointees will serve until removed by authority or appropriate commanders or superseded by acting or permanent officials appointed by the Commonwealth Government.

"* * * * * * *

"By command of Major General Sibert
(Sgd.) "MM. A CRAIG
"Major AGD, Asst. Adj. Gen."

By virtue of this designation respondent again took the oath of office on June 22, 1945, and continued performing the functions thereof.

It is admitted that on August 9, 1945, the commanding officer of the Tenth Military District issued a proclamation "revoking all proclamations, circulars, bulletins or orders by this Headquarters or lower units, pertaining to the civil government, civil affairs, and civilians effective 10 August 1945." And there seems to be no question that the X Corps was subordinate to the Tenth Military District which comprised Cotabato Province.

On October 8, 1945, the Secretary of Justice issued to petitioner an appointment worded as follows:

"In the interest of the Public service and pursuant to the provisions of section 1679 of the Administrative Code, as amended, you are hereby appointed Acting Provincial Fiscal of Cotabato, effective upon assumption of office."

In virtue of the above appointment, petitioner requested respondent on October 22, 1945 to turn over the office to him; but the latter refused to quit, explaining, however, that should he be disqualified or unable to perform the duties of the provincial fiscal in any particular cases, then such cases would be endorsed to petitioner.

C. *Discussion.* Upon consideration of the above undisputed material facts, we find two valid reasons why respondent and appellant must yield:

First. His designation of June 12, 1945, expressly stipulated that he will serve until "an *acting* or permanent fiscal is appointed by the Commonwealth Government." As the petitioner is undoubtedly an acting provincial fiscal appointed by the Commonwealth, respondent is now duty bound to vacate, under the very terms of his designation.

In this connection, respondent advances the proposition that only the President of the Commonwealth has the power to choose his successor. He is partly right, and partly wrong. Only the President has the power to appoint a "permanent" provincial fiscal; but the Secretary of Justice may appoint an "acting" provincial fiscal in accordance with the last sentence of section 1679 of the Revised Administrative Code, as amended.

Second. Respondent's designation was contained in a military order of June 12, 1945, which the subsequent proclamation of August 9, 1945, completely abrogated and rendered ineffective. Furthermore, by the announcement of General MacArthur of August 22, 1945, the United States Army authorities ceased to have any participation in the civil administration of the Philippines since September 1, 1945. (41 Off. Gaz., 494.)

Therefore, beginning August 9, 1945, or at the latest September 1, 1945, the authority given to respondent by the United States military authorities automatically lapsed. And as he received no appointment either from the Secretary of Justice or the President (the only persons empowered to appoint provincial fiscals under our Commonwealth, now the Republic), the office of Cotabato's fiscal was, in legal contemplation, vacant; and the Secretary of Justice had lawful authority to appoint petitioner as the acting fiscal thereof, pursuant to section 1679 of the Administrative Code, as amended, which, for convenience, is hereinbelow quoted:

> "When a provincial fiscal shall be disqualified by personal interest to act in a particular case or when for any reason he shall be unable, or shall fail, to discharge any of the duties of his position, the Secretary of Justice shall appoint an acting provincial fiscal, who shall discharge all the duties of the regular provincial fiscal which the latter shall fail or be unable to perform. * * * *This may also be done* in case of vacancy, pending the appointment of a permanent fiscal." (Italics ours.)

It is apparent from the above provision that the Secretary of Justice appoints an acting provincial fiscal: (*a*) when the incumbent is disqualified to act in a particular case or for any reason is unable or fails to discharge the

duties of his position; and (*b*) when the position is vacant, pending the appointment of a permanent fiscal.

Petitioner's appointment was not issued upon the first contingency, for it mentioned no particular instance or instances wherein the incumbent was disqualified or unable to act. Hence, it is evident, the appointment was made upon the second.

However, the respondent argues that, when Coloso's appointment was signed and delivered, the post was not vacant, because he—respondent—was then actually performing the duties of prosecuting officer. So far as we have been informed, this court has not passed upon this question, and this somehow justifies the appeal interposed by respondent. Yet American decisions have solved the point.

"As observed above, the word 'vacancy' when applied to public offices is not employed in a technical sense. It does not mean that the office is necessarily physically vacant. It may be vacant when it is occupied by one who is not a *de jure* officer, as by a mere usurper, or by one who is holding over. But although no corporal vacancy in the office exists in such a case, nevertheless there is a vacancy in the sense that the appointing or electing power may proceed to fill the office by choosing a successor." (42 American Jurisprudence, 977, 978.)

In State *vs.* Clark (87 Conn., 537; 89 Atl., 172), a similar situation arose. We quote from the court's opinion:

"In support of the claim that no vacancy existed, it is said that, although the respondent was not a *de jure* officer, it was his duty to remain in possession of the office after his fixed term had expired, until a duly qualified officer appeared, and that the provision of the city charter which has been referred to, and the resolution of appointment passed in conformity to it, conferred upon him at least the color of title, so that his possession of the office was that of a *de facto* officer at least; and it is claimed that an office is not vacant when in possession of a *de facto* incumbent. The word 'vacant' or 'vacancy' as applied to an office, is not to be taken in a strict technical sense in every case. In the eye of the law an office is vacant when it is not filled by a *de jure* incumbent. It may be thus vacant when it is occupied by one who is not a *de jure* officer, as by a mere usurper. We think that the word 'vacancies' is used in this sense in the statute in question, not as indicating that the office is physically vacant, but that it is not occupied by a *de jure* officer. It provides that the governor may fill any vacancy, however occurring. The plain purpose of the statute is to have every office supplied with a *de jure* officer, and applies as well to an office occupied by a usurper, as a hold-over or *de facto* officer, as to cases in which by death or resignation the office is left without any incumbent." (52 L. R. A., New Series, p. 915.)

It may be remarked, *passim*, that herein is no declaration that the acts performed by the respondent after August 9 or September 1, 1945, are of no effect. There is such a thing as officer *de facto*. Perhaps this explains why he

was compensated for services after that date. Yet it is unnecessary to delve into this presently. The only issue is petitioner's title to the office, which, as above stated, is undeniable.

D. *Judgment.* Affirmed. No costs.

Moran, C. J., Parás, Feria, Pablo, Perfecto, Hilado, Briones, Padilla, and *Tuason, JJ.,* concur.

Judgment affirmed.

[CA–No. 156. September 27, 1946]

MILTON GREENFIELD, plaintiff and appellant, *vs.* BIBIANO L. MEER, defendant and appellee

1. TAXATION; INCOME TAX; DEDUCTION OF LOSSES; DEALER IN SECURITIES; PERSONS ENGAGED IN TRADE OR BUSINESS OF BUYING AND SELLING SECURITIES WITHIN MEANING OF PHRASE "INCURRED IN TRADE OR BUSINESS" USED IN SECTION 30(*d*) (1) (A) OF COMMONWEALTH ACT NO. 466.—Taking into consideration the nature of mining securities, which may be bought or sold either as a business or for speculation purposes only, the National Assembly of the Philippines has deemed it necessary to define or determine before hand in section 84(*t*) of Commonwealth Act No. 466 who may be considered as persons engaged in the trade or business of buying and selling securities within the meaning of the phrase "incurred in trade or business" used in section 30(*d*) (1) (A) of the same Act, in order to avoid any question or doubt as to deductibility of all losses incurred by a merchant in securities from his net income from whatever source. The definition of dealer or merchant in securities given in said section 84(*t*) includes persons, natural or juridical, who are engaged in the purchase and sale of securities whether for their own account or for others, provided they have a place of business and are regularly engaged therein.

2. ID.; ID.; ID.; ID.; ID.; CAPITAL ASSETS.—Appellant contends that as from Exhibit A it appears that the mining securities were inventoried in order to arrive at his profits and losses, they cannot be considered as capital assets, because, according to section 34, the term capital assets does not include property which would properly be included in the inventory. But it is to be observed that the law refers not to property merely included, but to that which would be properly included in the inventory. Section 148 of the Income Tax Regulations No. 2 of Febraury 10, 1940 (39 Off. Gaz., 325), provides that "the securities (to be) inventoried as here provided may include only those held for purposes of resale and not for investment," and that "the taxpayers who buy and sell or hold securities for investment or speculation, * * * are not dealers in securities within the meaning of this rule." And the General Counsel of the Federal Bureau of Internal Revenue, after quoting article 105 of United States Regulations 74 from which said section 148 of our Income Tax Regulations was taken, said that a person not a dealer in securities is precluded from the use of inventories in computing his net income." (C. B. X–2, p. 128, G. C. M., 9656.)

3. ID.; ID.; STATUTORY CONSTRUCTION; STATUTE SUSCEPTABLE OF SEVERAL INTERPRETATIONS; HISTORY OF STATUTE.—Where a statute has been enacted which is susceptible of several interpretations there is no better means for ascertaining the will and intention of the legislature than that which is afforded by the history of the statute.

4. ID.; ID.; PERSONAL AND ADDITIONAL EXEMPTIONS DEDUCTED FROM GROSS INCOME.—The mere fact that the phrase "in the nature of a deduction" found in section 7 of the old law was omitted in section 23 of the new or National Internal Revenue Code did not and could not effect any change in the law. It is evident that said phrase was added or inserted in said section 7 only out of extreme caution, because, even without it, the exemption would have to be deducted from the gross income in order to determine the net income subject to tax. Had the provision in the old law been drafted in exactly the same term as that of said section 23, the same construction should have been adopted. Because "Exemption is an immunity or privilege; it is freedom from a charge or burden to which others are subjected." (Florar *vs.* Sherifan, 137 Ind., 28; 36 NE., 365, 369.) If the amounts of personal and additional exemptions fixed in section 23 are exempt from taxation, they should not be included as part of the net income, which is taxable. There is nothing in said section 23 to justify the contention that the tax on personal exemptions (which are exempt from taxation) should first be fixed, and then deducted from the tax on the net income.

5. ID.; ID.; STATUTORY CONSTRUCTION; CHANGE IN PHRASEOLOGY DOES NOT NECESSARILY ALTER CONSTRUCTION OF OLD LAW.—In the revision of statutes, neither an alteration in phraseology nor the omission or addition of words in the latter statute, shall be held, necessarily, to alter the construction of the former act. And the court is only warranted in holding the construction of a statute, when revised, to be changed, where the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction. It should be remembered that condensation is a necessity in the work of compilation or codification. Very frequently words which do not materially affect the sense will be omitted from the statutes as incorporated in the code, or that same general idea will be expressed in briefer phrases. No design of altering the law itself could rightly be predicated upon such modifications of the language.

APPEAL from a judgment of the Court of First Instance of Manila. Jugo, J.

The facts are stated in the opinion of the court.

Francisco Dalupan for appellant.

First Assistant Solicitor-General Reyes and *Solicitor Arguelles* for appellee.

FERIA, *J.:*

This is an appeal from the decision of the Court of First Instance of Manila which dismisses the complaint of the plaintiff and appellant containing two causes of action; one to recover the sum of ₱9,008.14 paid as income tax for the year 1939 by plaintiff to defendant under protest,

by reason of defendant having disallowed a deduction of ₱67,307.80 alleged by plaintiff to be losses in his trade or business; and the other to reclaim, in the event the first cause of action is dismissed, the sum of ₱475 collected by defendant from plaintiff illegally according to the latter, because the former has erroneously computed the tax on personal and additional exemptions.

The following are the pertinent facts stipulated and submitted by the parties to the lower court:

"2. That since the year 1933 up to the present time, the plaintiff has been continuously engaged in the embroidery business located at 385 Cristobal, City of Manila and carried on under his name;

"3. That in 1935 the plaintiff began engaging in buying and selling mining stocks and securities for his own exclusive account and not for the account of others * * *;

"4. That Exhibit A attached to the complaint and made a part hereof represents plaintiff's purchases and sales of each class of stock and security as well as the profits and losses resulting on each class during the year 1939;

"5. That the plaintiff has not been a dealer in securities as defined in section 84(*t*) of Commonwealth Act No. 466; that he has no established place of business for the purchase and sale of mining stocks and securities; and that he was never a member of any stock exchange;

"6. That the plaintiff filed an income tax return for the calendar year 1939 showing that he made a net profit amounting to ₱52,449.29 on embroidery business and ₱17,850 on dividends from various corporations; and that from the purchase and sales of mining stocks and securities he made a profit of ₱10,741.30 and incurred losses in the amount of ₱78,049.10, thereby sustaining a net loss of ₱67,307.80, which income tax return is hereto attached and marked Exhibit B;

"7. That in said income tax return for 1939, the plaintiff declared the results of his stock transactions under schedule B (Income from Business); but the defendant ruled that they should be declared in the income tax return, Exhibit B, under Schedule D (Gains and Losses from Sales or Exchanges of Capital Assets, real or personal);

"8. That in said income tax return, said plaintiff claims his deduction of ₱67,307.80 representing the net loss sustained by him in mining stocks and securities during the year 1939; and that the defendant disallowed said item of deduction on the ground that said losses were sustained by the plaintiff from the sale of mining stocks and securities which are capital assets, and that the loss arising from the sale of the same should be allowed only to the extent of the gains from such sales, which gains were already taken into consideration in the computation of the alleged net loss of ₱67,307.80;

"9. That the defendant assessed plaintiff's income tax return for the year 1939 at ₱13,771.06 as shown in the following computation appearing in the audit sheet of the defendant hereto attached and marked Exhibit C;

"Net income as per return of plaintiff for 1939	₱70,299.29
"Add: Net Loss on sale of mining stocks and securities disallowed in audit	67,307.80
"Total net income as per office audit	₱137,607.09

"Amount of tax on net income as per office audit		₱13,821.06
"Less: Tax on exemptions:		
"Personal exemption	₱2,500.00	
"Additional exemption	1,000.00	
"Total	₱3,500.00	
"Tax on exemptions		50.00
"Net amount of tax due		₱13,771.06

"10. That the defendant computed the graduated rate of income tax on the entire net income as per office audit, without first deducting therefrom the amount of personal and additional exemptions to which the plaintiff is entitled, allowing said plaintiff a deduction from the assessed tax the amount of ₱50 corresponding to the exemption of ₱3,500;

"11. That the plaintiff, objecting and excepting to all the rulings of the defendant above mentioned and in assessing plaintiff with ₱13,771.06, claimed from the defendant the refund of ₱9,908.14 or in the alternative case ₱475, which claim of plaintiff was overruled by the defendant;"

The questions raised by appellant in his four (4) assignments of errors may be reduced into the following: (1) Whether the losses sustained by the plaintiff from the buying and selling of mining securities during the year 1939 are losses incurred in trade and business, deductible under section 30(*d*) (1) (A) of Commonwealth Act No. 466 from his gains in his embroidery business and other income; or whether they are capital losses from sales of capital assets which shall be allowed only to the extent of the gains from such sales under section 34 of the same Commonwealth Act No. 466. And (2) whether, under the present law, the personal and additional exemptions granted by section 23 of the same Act, should be considered as a credit against or be deducted from the net income, or whether it is the tax on such exemptions that should be deducted from the tax on the total net income.

1. As to the first question, it is agreed in the above-quoted stipulation of facts that the plaintiff was not a dealer in securitties or shares of stocks as defined in section 84(*t*) of Commonwealth Act No. 466. The question for determination is whether appellant, though not a dealer in mining securities, may be considered as engaged in the business of buying and selling them under section 30(*d*), (1) (A) of said Act No. 466.

It is evident that, taking into consideration the nature of mining securities, which may be bought or sold either as a business or for speculation purposes only, the National Assembly of the Philippines has deemed it necessary to define or determine beforehand in section 84(*t*) of Commonwealth Act No. 466 who may be considered as persons

engaged in the trade or business of buying and selling securities within the meaning of the phrase "incurred in trade or business" used in section 30(*d*) (1) (A) of the same Act, in order to avoid any question or doubt as to deductibility of all losses incurred by a merchant in securities from his net income from whatever source. The definition of dealer or merchant in securities given in said section 84(*t*) includes persons, natural or juridical, who are engaged in the purchase and sale of securities whether for their own account or for others, provided they have a place of business and are regularly engaged therein. There was formerly some doubt or question as to whether a person engaged in buying and selling securities for his own account might be considered as engaged in that trade or business, and several cases involving such question had been submitted to the United States Federal Courts for ruling, and to the Income Tax Units of the United States Bureau of Internal Revenue for opinion. But with the inclusive definition of the term "dealer" or merchant of securities given in section 84(*t*) of Act No. 466, such doubt can no longer arise.

Said section 84 (*t*) reads as follows:

"(*t*) The term 'dealer in securities' means a merchant of stocks or securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom."

Appellant assumes, however, that the above-quoted definition does not cover or include all persons engaged in the trade or business of buying and selling securities within the meaning of said section 30(*d*) (1) (A). He contends that, although he is not a dealer in mining securities, he may be considered as having been engaged in the trade or business of buying and selling securities. And in support of his contention appellant quotes Opinion No. 1818 of the Income Tax Unit of the United States Bureau of Internal Revenue (I. T. No. 1818, C. B. II, pp. 39–41), in which opinion the following was said:

"The taxpayer is not a member of any stock exchange, has no place of business, and does not make purchases and sales of securities for customers. Much of his trading is done on margin. He devotes the greater part of the time in his broker's office keeping in touch with the market. He has no other trade or business, his income consisting entirely of interest on bonds, dividends on stocks, and profits from the sale or other disposition of securities.

"Advice is requested (1) whether this taxpayer is entitled to the benefit of section 204 of the Revenue Act of 1921, with reference to a net loss incurred in 1921, from the sale of stocks; (2) whether he is entitled to the benefit of section 206 of the Revenue Act of 1921,

with regard to gains derived in 1922 from the sale of two blocks of stock held more than two years.

"1. Section 204(*a*) provides in part:

" 'That as used in this section the term 'net loss' means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer * * *.'

"The question is, then, whether the taxpayer was regularly engaged in the trade or business of buying and selling securities.

"The interpretation placed upon the term 'business or trade' by the courts and by the department may be indicated by a few llustrative decisions. In two early cases (*In re* Marson [1871], Fed. Cas. No. 9142, and *In re* Woodward [1876], Fed. Cas. No. 18001) it was held that a speculator in stocks was not a 'merchant or tradesman' within the meaning of the Bankruptcy Act of 1867. It was said in the former case:

" 'The only business he was engaged in was what is called speculating in stocks, that is, buying and selling them, with a view to his own profit, to be made by the excess of the selling price over the buying price * * *. The fact that the bankrupt was engaged in no other business can not have the effect to make him a merchant or a tradesman, because he carried on the business he did carry on in the way in which he carried it on.'

"That is, although his business was buying and selling, since this business was simply with a view to his own profit and not for others, he was not a merchant or tradesman. Compare *In re* Surety Guarantee & Trust Co. (1902 121 Fed., 73) and *In re* H. R. Leighton & Co. (1906 147 Fed., 311).

"With this background, the Department, in Treasury Decisions 1989, 2005, 2090, and 2135 (not published in Bulletin service), held that the provision of paragraph B of the 1913 Act, allowing as a deduction for the purpose of the normal tax 'losses actually sustained during the year, incurred in trade * * *,' did not include losses from isolated transactions; for instance, in stocks and bonds. In Mente *vs.* Eisner (1920 266 Fed., 161) (certiorari denied, 254 U. S., 635), these rulings were upheld in a case in which a manufacturer of bagging was denied deductions for losses in buying and selling cotton on the cotton exchange for his individual account, not connected with his manufacturing business. (Of. Black *vs.* Bolen [1920] 268 Fed., 427.) Likewise, in L. O. 601 (not published in Bulletin service), it was held that 'losses sustained by a person in buying and selling securities on his own account, he not being a licensed stock and bond broker buying and selling for others as well as for himself, are not deductible as losses in trade within the meaning of paragraph B of the Act of October 3, 1913.' The basis of these opinions is thus seen to be (1) that dealing in securities on one's own account is not technically a 'trade'; (2) that isolated transactions in securities, not connected with the tax payer's regular business, do not constitute a 'trade.'

"In the Act of September 8, 1916, the wording of the 1913 Act was slightly changed (section 5[*a*] fourth) to permit a deduction of 'losses atually sustained during the year, incurred in his business or trade * * *.' Under this more liberal provision, it has been uniformly held that where a taxpayer devoted all his time, or the major portion of it, to buying and selling securities on his own account, this occupation was his 'business'; and therefore he was permitted to deduct losses sustained in such dealings as being 'incurred in his business.' A. R. R. 404 (C. B. 4, p. 157); semble L. O. 601. These rulings are inferentially supported by the definitions of trade or busi-

ness to comprehend 'all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation,' contained in article 8 of Regulations 41, relative to the war excess-profits tax (approved in Woods *vs.* Lewellyn [1921], 289 Fed., 498). * * *

"It is submitted that these decisions are a sound interpretation of the accepted definition of business: 'Business' is a very comprehensive term and embraces everything about which a person can be employed.' Black's Law Dictionary, 158, citing People *vs.* Commissioners of Taxes (23 New York, 242, 244). 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. 1, p. 273. Fling *vs.* Stone Tracy Co. (1910), 220 U. S. 107 at 171; 31 Sup. Ct., 342; 55 Law. ed., 389; Ann. Cas. 1912–B., 1312; cited with approval in Von Baumbach *vs.* Sargent Land Company (1916), 242 U. S., 503, at 515. If they are sound, the facts of the instant case require a ruling that the taxpayer was regularly engaged in the business of buying and selling securities on his own account and was, therefore, entitled to the benefit of the provisions of section 204 (*a*)." (I. T. No. 1818; C. B. II–2, pp. 39–41.)

But, assuming *arguendo* that the above-quoted opinion may be applied to the present case, it is evident that the appellant can not be considered as having been engaged in the business of buying and selling securities within the meaning of section 30 (*d*) (1) (A) of Act No. 466. According to said opinion, in order that he may be so considered, it is necessary that he must devote all his time or at least a major portion thereof to said business and that the latter must be regularly carried on by him.

In the stipulation of facts presented in this case it is agreed that "since the year 1933 up to the present time, the plaintiff has been continuously engaged in the embroidery business," and that "in 1935, the plaintiff began *engaging in buying and selling* mining stock and securities for his own exclusive account." There is nothing therein to show that plaintiff and appellant has regularly devoted all his time or the major portion thereof to the business of buying and selling mining securities for his own account. On the contrary, it having been stipulated that he has been continuously engaged in the embroidery business during the same time, it necessarily follows that he has not and could not have devoted regularly all his time or a major portion thereof to the buying and selling of mining securities.

Furthermore, from Exhibit A attached to the complaint and made a part of said stipulation of facts, which represents plaintiff's purchases and sales of each class of stocks and securities as well as the profits and losses resulting therefrom during the year 1939, it appears that he made purchases and sales of securities only on several days of some months and nothing on others. As shown in said exhibit, during the month of January, 1939, appellant purchased shares of stock of different mining corporations on January 2, 3, 4, 6, 13, 19, 20, 25, 30, and sold some of them on January 4, 10, 13 and 31. During February he

made purchases on the dates 1, 8, 13, 14, 25 and 27; and sales on 6, 9, 10, 16 and 17. During March, he purchased mining securities on 7, 8, 9, 10, 16, 22 and 30, and sold some on March 9 only. During April, he made two purchases on April 3 and 5, and one sale on April 4. During May, he purchased mining shares of stock on May 9, 10, 13, 19, 24 and 25; and sold some of them on May 9, 10, 12, 13 and 31. During June, appellant made purchases on 1, 3, 5, 8, 13, 15 and 17, and sales on 22, 23, 24, and 28. During July, purchases on 1, 3, 6, 19; and sales on July 24, 25, 26 and 27. During August, he purchased shares of stock on some mining corporations on 5, 7, 16, and 18 and sold shares of one mining corporation on August 10 only. During September, appellant did not purchase or sell any securities. During October, he sold securities only on the 12th of said month, and made no purchase at all. And during November and December he did not purchase or sell any.

Appellant contends that as from Exhibit A it appears that the mining securities were inventoried in order to arrive at his profits and losses, they cannot be considered as capital assets, because, according to section 34, the term capital assets does not include property which would properly be included in the inventory. But it is to be observed that the law refers not to property merely included, but to that which would be properly included in the inventory. Section 148 of the Income Tax Regulations No. 2 of February 10, 1940 (39 Off. Gaz., 325), provides that "the securities (to be) inventoried as here provided may include only those held for purposes of resale and not for investment," and that "the taxpayers who buy and sell or hold securities for investment or speculation, * * * are not dealers in securities within the meaning of this rule." And the General Counsel of the Federal Bureau of Internal Revenue, after quoting Article 105 of United States Regulations 74 from which said section 148 of our Income Tax Regulations was taken, said that a person not a dealer in securities is precluded from the use of inventories in computing his net income." (C. B. X–2, p. 128, G. C. M. 9656.)

The lower court has not therefore erred in dismissing appellant's first cause of action, on the ground that the losses sustained by appellant from the buying and selling of mining securities are not losses incurred in business or trade but are capital losses from sales of capital assets, as contended by appellee.

2. With regard to the second point, the lower court held that, as the new law does not provide that the personal exemptions shall be allowed in the nature of a deduction from the net income, as prescribed in the old law, and there is a distinction between exemption and deduction, the tax

due on said exemptions must be deducted from the tax due on the whole net income, instead of deducting the total amount of the exemptions from the net income.

The argument of the appellee in support of the lower court's decision is that the omission in section 23 of Act No. 466 of the phrase "in the nature of a deduction" found in section 7 of the old law, shows that it was the intention of the National Assembly to adopt the innovation proposed by the Tax Commission which prepared the draft of the new law, an innovation based on what is known as the "Wisconsin plan" now in operation in several American states. Under said plan, the cummulative amount of the tax is fixed on any given amount of net income without regard to the status of the taxpayer, and then this amount is reduced by the tax credit fixed in the law according to the status of the taxpayer and the number of his dependents as follows: for single individuals, there is allowed a tax credit of ₱10; for married persons or heads of family, ₱30; and for each dependent below 21 years of age ₱10.

Section 7 of the old law provides: "For the purpose of the normal tax only, there shall be allowed as an exemption in the nature of a deduction from the amount of the net income * * *"; while section 23 of the new law provides "For the purpose of the tax provided for in this Title there shall be allowed the following exemptions:" Now, the question to be determined or answered is: Does this change in the phraseology of the law show the intention of the National Assembly to change the theory or policy of the old law so as to deduct now the tax on the personal and additional exemptions from the tax fixed on the amount of the net income, instead of deducting the amount of personal and additional exemptions from that of the net income, before determining the tax due on the latter?

It is a well-settled rule of statutory construction that where a statute has been enacted which is susceptible of several interpretations there is no better means for ascertaining the will and intention of the legislature than that which is afforded by the history of the statute. Taking into consideration the history of section 23 of the Commonwealth Act No. 466, the answer to the above-propounded question must obviously be in the negative. Section 22 of the bill entitled "An Act to revise, amend and codify the Internal Revenue Laws of the Philippines," prepared by the Tax Commission and submitted to the National Assembly of the Philippines, in substitution of section 7 of the old Income Tax Law, reads as follows:

"SEC. 22. *Amount of tax credit allowable to individuals.*—There shall be allowed as a credit in the nature of a deduction from the

amount of the tax payable by each citizen or resident of the Philippines under section 20:

"(a) *Tax credit of single individuals.—The sum of ₱10* if the person making the return is a single person or a married person legally separated from his or her spouse.

"(b) *Tax credit of a married person or head of family.—The sum of ₱30* if the person making the return is a married man with a wife not legally separated from him, or a married woman with a husband not legally separated from her, or the head of the family: *Provided,* That from the tax due on the aggregate income of both husband and wife when not legally separated *only one tax credit of ₱30 shall be deducted.* For the purpose of this section, the term 'head of a family' includes an unmarried man or woman with one or both parents, or one or more brothers or sisters, or one or more legitimate, recognized natural or adopted children dependent upon him or her for *their chief* support where such brothers, sisters, or children are less than twenty-one years of age.

"(c) *Additional tax credit for dependents.—The sum of ₱10* for each legitimate, recognized natural, or adopted child wholly dependent upon the taxpayer, if such dependents are under twenty-one years of age, or incapable of self-support because mentally or physically defective. The additional tax credit under this paragraph shall be allowed only if the person making the return is the head of a family."

But the National Assembly, instead of adopting or incorporating said proposed section 22 in the National Internal Revenue Act, Code C. A. No. 466, copied substantially in section 23 of the latter the provision of section 7 of the old law relating to personal and additional exemptions, with the only modification that the amount of personal exemption of single individuals has been reduced from two thousand to one thousand pesos, and that of married persons or heads of family from four thousand to two thousand five hundred pesos.

If it were the intention of the National Assembly to adopt the "Wisconsin plan" proposed by the Tax Commission, it would have adopted literally, or at least substantially, the provisions of said section 22 as section 23 of Commonwealth Act No. 466, instead of substantially incorporating section 7 of the old Income Tax law as section 23 of the new, except the first paragraph thereof which read: "For the purpose of the normal tax only, there shall be allowed as an exemption in the nature of a deduction from the amount of the net income." This was changed in said section 23, which provides: "For the purpose of the tax provided for in this Title, there shall be allowed the following exemptions:" From the fact that the National Assembly discarded completely section 22 of the bill drafted in accordance with the "Wisconsin plan" and submitted by the Tax Commission, it is to be presumed that the National Assembly of the Philippines did not intend to introduce any substantial change in the old law in so far as the effect of personal and additional exemptions on the income tax is concerned.

The mere fact that the phrase "in the nature of a deduction" found in section 7 of the old law was omitted in section 23 of the new or National Internal Revenue Code did not and could not effect any change in the law. It is evident that said phrase was added or inserted in said section 7 only out of extreme caution, because, even without it, the exemption would have to be deducted from the gross income in order to determine the net income subject to tax. Had the provision in the old law been drafted in exactly the same term as that of said section 23, the same construction should have been adopted. Because "Exemption is an immunity or privilege; it is freedom from a charge or burden to which others are subjected." (Florar *vs.* Sherifan, 137 Ind., 28; 36 NE., 365, 369.) If the amounts of personal and additional exemptions fixed in section 23 are exempt from taxation, they should not be included as part of the net income, which is taxable. There is nothing in said section 23 to justify the contention that the tax on personal exemptions (which are exempt from taxation) should first be fixed, and then deducted from the tax on the net income.

The change of phraseology alone does not lead to the conclusion that it was the intention of the lawmaker to amend or change the construction of the old law as contended by the appellee. For it is a well-established rule, recognized by the Supreme Court of Ohio in the case of Conger *vs.* Barker's Adm'r, 11 Ohio St., 1; "that in the revision of statutes, neither an alteration in phraseology nor the omission or addition of words in the latter statute, shall be held, necessarily, to alter the construction of the former act. And the court is only warranted in holding the construction of a statute, when revised, to be changed, where the intent of the legislature to make such change is clear, or the language used in the new act plainly requires such change of construction. It should be remembered *that condensation* is a necessity in the work of compilation or codification. *Very frequently words which do not materially affect the sense will be omitted from the statutes as incorporated in the code, or that same general idea will be expressed in briefer phrases.* No design of altering the law itself could rightly be predicated upon such modifications of the language." (Italics ours.) See Black on the Construction and Interpretation of the Laws, Second Edition, pp. 594, 595.

Our Income Tax Law is patterned after the United States Revenue or Income Tax Laws. The United States Revenue Laws of 1916, 1918, 1921, 1924, 1926, 1928 and 1932 considered the personal and additional exemptions as credits against the net income for the purpose of the normal tax; and subsequently, the United States Revenue Acts of 1934, 1936 and 1938 amended the former acts by making said

exemptions as credits against the net income for the purpose of both the normal tax and surtax. Section 7 of our old Income Tax Law, instead of providing that the personal and additional exemptions shall be allowed as a credit against the net income, as in the United States Revenue Acts, prescribed that the amounts specified therein shall be allowed as an exemption in the nature of a deduction from the amount of the net income. Which has exactly the same effect as the provision regarding personal and additional exemptions in the said United States Revenue Acts. For, as it was explained in the Ways and Means Committee Report No. 764, 73rd Congress, 2nd Session, pages 6, 23:

"To carry out the policy of retaining practically the same tax burden on ordinary income, it is necessary in connection with the proposed plan to allow the personal exemption and credits for dependents as an offset against surtax as well as normal tax. The personal exemption and credits for dependents would appear to be in lieu of deductions for necessary living expenses. They may well apply to both taxes as do all other ordinary deductions."

And Paul and Mertens, Law of Federal Taxation, Vol. 3, p. 509, state regarding the change in the United States Revenue Act of 1934: "The practical effect of this statutory change is to convert the personal exemption and credit for dependents into *deductions* * * * ." (Italics ours.)

The lower court, therefore, erred in not declaring that personal and additional exemptions claimed by appellant should be credited against or deducted from the net income, and consequently in not sentencing appellee to refund to appellant the sum of ₱475.

In view of all the foregoing, the decision of the lower court is affirmed in so far as it dismisses appellant's first cause of action, and is reversed in so far as it dismissed his second cause of action. Appellee is sentenced to refund to appellant the sum of ₱475 claimed in the second cause of action of the complaint. Without pronouncement as to costs. So ordered.

Moran, C. J., Pablo, Hilado, Bengzon, Briones, and *Tuason, JJ.,* concur.

PARÁS, *J.,* concurring and dissenting:

I concur in the majority opinion in so far as it affirms the dismissal of appellant's first cause of action, but I dissent from so much thereof as reverses the dismissal of appellant's second cause of action.

The elimination from section 23 of the National Internal Revenue Code of the words "in the nature of a deduction from the amount of the net income" (which appeared in section 7 of the old Income Tax Law), could not have been effected without a purpose; and said purpose certainly is not to retain the meaning and effect of the suppressed

words. If the legislative department did not intend to make an essential change, the logical and clear way of doing so was to recopy the old provision. Said elimination was undoubtedly in answer to, and an acceptance of, the innovation proposed by the Tax Commission, namely, that the amount payable under the present law should be the difference between the tax due on the entire net income and that due on the exemptions, thereby doing away with the former practice of allowing the exemptions to be deducted from the net income and basing the tax on the difference. We cannot say that the failure of the lawmakers to incorporate in the new Code the provision regarding tax credits allowable to individuals, as prepared and submitted by the Tax Commission to the National Assembly in substitution of section 7 of the old Income Tax Law, suggests a rejection of the new plan and the retention of the old policy, since the desired aim had equally been accomplished by mere elimination of the words above referred to. Indeed, at the rates fixed in section 21 of the new Code, the amounts of personal and additional exemptions granted to individuals under section 23 are exactly the amounts specified in the provision recommended by the Tax Commission, namely, ₱10 for single individuals, ₱30 for married persons or heads of family, and ₱10 for each dependent. Section 23 should thus be construed not as an original provision, but as one which is the result of a revision.

The interpretation now pursued by the Government is further consistent with the circumstance that the tax is levied upon the "entire net income" (section 21), which means "the gross income computed under section 29, less the deductions allowed by section 30" (section 28). It is significant that section 30 fails to make any reference to "Personal exemptions." The explanation contained in the Ways and Means Committee Report No. 764, 73rd Congress, 2nd Session, to the effect that the "personal exemption and credits for dependents would appear to be in lieu of deductions for necessary living expenses," cannot have controlling force because, in computing the net income both under the new Code (section 31) and under the old Income Tax Law (section 5), no deduction is allowed in respect of living expenses.

Of course, neither an alteration in phraseology nor the omission or addition of words in a later statute will necessarily alter the construction of the former act, but, in the present case, the eliminated words were the very basis for the prior construction. The alteration here is one of substance, and not merely of form.

Besides, the majority, by their position, are (unwittingly I hope), playing favorite to the taxpayers in the upper brackets,—a situation which undoubtedly could not have

been intended by the legislators. The following remarks of counsel for the Government are in point:

"Lastly, the action of the appellee Collector, in allowing merely a tax credit upon the amount of the personal exemptions, gives all taxpayers entitled to the same exemptions, and equal privilege. The tax saving is the same for taxpayers having equal number of dependents, whether rich or poor, just as the amount of exemptions remains the same for all taxpayers under analogous circumstances.

"On the contrary, the method advocated by appellant (of deducting the exemption from the total taxable income) benefits the rich taxpayers, rather than the poor ones. To convince us of the fact, it is enough to compute the tax on an income lesser than appellant's; say, of ₱15,000.

"Appellant's Method		Appellee's Method	
Net income	₱15,000.00	Net income	₱15,000.00
Less income	3,500.00		
"Taxable income	₱11,500.00	Taxable income	₱15,000.00

"Taxed as follows:

"Income	Rate	Tax	Income	Tax	
₱2,000.00	1%	₱20.00	₱2,000.00	Exempt.	
2,000.00	2%	40.00	2,000.00	₱10.00	(1,500 exempt)
2,000.00	3%	60.00	2,000.00	60.00	
4,000.00	4%	160.00	4,000.00	160.00	
1,500.00	5%	75.00	5,000.00	250.00	
₱11,500.00		₱355.00	₱11,500.00	₱480.00	

"A comparison of this computation with that of the tax on appellant's income, page 19 of this brief, reveals that, in appellant's case, the deduction of the exemption results in a saving of 15 per cent tax on ₱3,500 (₱525) while in the case just discussed, where the taxpayer's income is much less, the deduction method saves the taxpayer only 5 per cent tax on ₱3,500 (₱175), because in this case the highest bracket of the taxpayer's income is only subject to 5 per cent. So that the appellant, with an income of ₱137,607.09, economizes by the deduction *three* times more than the second taxpayer whose income is merely ₱15,000. It requires little argument to show that a method of computing taxes whereby the same exemption results in a *higher benefit* for the taxpayer with the *bigger income* can neither be just nor equitable."

My vote is to affirm the judgment appealed from *in toto*.

PADILLA, *J.*, concurring and dissenting:

I dissent from the opinion of the majority on the second cause of action only.

It must be borne in mind that an exemption is neither an exclusion provided for in section 29(*b*) nor a deduction provided for in section 30, C. A. No. 466. Not being a deduction, the amount constituting an exemption must not be excluded or deducted from the gross or net income. Exemption means condonation, remission, or, as the trial court aptly calls, waiver of the tax by the government. The amount of exemption being fixed (section 23, C. A. No. 466), the tax condoned, remitted or waived must also

be fixed. The exemption provided for in the Income Tax Law is for personal, living, or family expenses of the taxpayer. It is the same amount regardless of the amount of net income subject to tax. The law makes no distinction between small and large incomes. The collector's computation accomplishes the aim of the law, for the tax on the amount exempted would be same for every net income, large or small, subject to tax. To illustrate, let us take the case of two married persons with spouses not legally separated from them and each with three dependent children, whose net incomes are ₱10,000 and ₱30,000, respectively. Under the Collector's interpretation of the law, the computation would be, as follows:

₱10,000.00 net income		
₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
4,000.00	4%	160.00
₱10,000.00	Tax	₱220.00
	Exemption	₱60.00

₱30,000.00 net income		
₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
4,000.00	4%	160.00
10,000.00	5%	500.00
10,000.00	6%	600.00
₱30,000.00	Tax	₱1,320.00
	Exemption	₱60.00

Under appellant's interpretation of the law, the computation would be, as follows:

₱10,000.00 net income		
4,000.00 less exemption		
₱6,000.00 taxable net		
₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
₱6,000.00	Tax	₱120.00

₱30,000.00 net income		
4,000.00 less exemption		
₱26,000.00 taxable net		
₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
4,000.00	4%	160.00
10,000.00	5%	500.00
6,000.00	6%	360.00
₱26,000.00	Tax	₱1,140.00

or under appellant's other interpretation of the law, the computation would be, as follows:

₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
4,000.00	4%	160.00
₱10,000.00	Tax	₱120.00
	Exemption	₱160.00

₱2,000.00	1%	₱20.00
2,000.00	2%	40.00
2,000.00	3%	60.00
4,000.00	4%	160.00
10,000.00	5%	500.00
6,000.00	6%	360.00
4,000.00	6%	240.00
₱30,000.00	Tax	₱1,140.00
	Exemption	₱240.00

The result under appellant's computation is that a large net income would enjoy a bigger amount of tax exemption than a small net income, when the law is clear that such

exemption is of fixed amount regardless of the amount of net income subject to tax.

It is not correct to say that the "Wisconsin Plan" referred to in the majority opinion was not adopted. It was adopted not in form but in substance.

I am of the opinion that the judgment under review should be affirmed.

PERFECTO, *J.*, dissenting and concurring:

We dissent from the majority opinion affirming the decision of the lower court in so far as it dismisses appellant's first cause of action.

Plaintiff "filed an income tax return for the calendar year 1939 showing that he made a net profit amounting to ₱52,449.29 on embroidery business and ₱17,850 on dividends from various corporations; and that from the purchase and sales of mining stocks and securities he made a profit of ₱10,741.30 and incurred losses in the amount of ₱78,049.10, thereby sustaining a net loss of ₱67,307.80, * * *."

Defendant disallowed the deduction of the loss of ₱67,307.80, on the theory that the loss was sustained by plaintiff from the sale of mining stocks and securities which are capital assets and that the loss arising from the same should be allowed only to the extent of the gain from such sales.

The question is whether the loss was incurred in trade and business.

"'Business is a very comprehensive term and embraces everything about which a person can be employed.' Black's Law Dictionary, 158, citing People *vs.* Commissioners of Taxes (23 New York, 242 244). 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. 1, p. 273. Fling *vs.* Stone Tracy Co. (1910), 220 U. S., 107 at 171; 31 Sup. Ct., 342; 55 Law. ed., 389; Ann. Cas. 1912–B. 1312, cited with approval in Von Baumbach *vs.* Sargent Land Company (1916), 242 U. S., 503 at 515."

We do not have any doubt that plaintiff engaged in the business and trade of buying and selling mining stocks and securities. We do not see any reason why the losses sustained by him in said business should be disallowed in the computation for purposes of determining the income tax he has to pay.

We are of opinion that the lower court's decision should be reversed and that, as to plaintiff's first cause of action, defendant should be ordered to reimburse the plaintiff the amount of ₱9,008.14 paid by plaintiff to defendant under protest.

In regards to the second cause of action of plaintiff, we agree with the theory of the majority as explained in the opinion, but we can not concur in the dispositive part

thereof ordering the refund of the sum of ₱475, in view of the conclusion we have arrived at regarding plaintiff's first cause of action, it appearing that plaintiff only prays for the refund of ₱475 as an alternative in the event his first cause of action is dismissed.

Judgment modified.

[CA-No. 77. Septiembre 30, 1946]

EL PUEBLO DE FILIPINAS, querellante y apelado, *contra* FERNANDO GUEVARRA y OTROS, acusados y apelantes

DERECHO PENAL; PRUEBA; TESTIMONIO SIN CORROBORACIÓN; SUFICIENCIA; REQUISITO.—Un solo testimonio, aún sin corroboración, es a veces suficiente para una convicción. Sostiene esta doctrina numerosas citas de jurisprudencia. Pero condiciona la doctrina un requisito importantísimo, a saber: que el testimonio único pueda resistir al más severo análisis, dado el conjunto de las circunstancias que rodean el caso. De otro modo, una doctrina de no inferior categoría—de la duda razonable—flota y prevalece para amparar al procesado.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Tayabas. Del Rosario, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

Sres. Alidio, Lainez & Elegir en representación de los apelantes.

El Primer Procurador General Auxiliar Sr. Reyes y *el Procurador Sr. Madamba* en representación del Gobierno.

BRIONES, *M.:*

Trátase de la apelación interpuesta por Fernando Guevarra y sus tres hijos, Marcos, Emilio y Ciriaco, de la sentencia del tribunal inferior en que se les declara reos de robo con homicidio y se les condena a sufrir cada uno la pena de reclusión temporal; a indemnizar a la parte ofendida mancomunada y solidariamente en la suma de ₱2,660, importe de la propiedad robada; a indemnizar además, también mancomunada y solidariamente, a los herederos del occiso Eulogio Laylo en la cantidad de ₱2,000, sin prisión subsidiaria en caso de insolvencia en ambas indemnizaciones; y a pagar las costas del juicio. Durante la pendencia de esta apelación Fernando y Marcos han muerto en la cárcel; así que sólo queda la causa de Emilio y Ciriaco, y es la que tenemos que decidir ahora.

Las pruebas de la acusación tienden a establecer los siguientes hechos: Eulogio Laylo, con su esposa, Rosario Magcawas, y sus tres hijos pequeños, vivían tranquilamente en su casita en el barrio de Masalukot II, también llamado Quinte, del municipio de Candelaria, de la que fué

provincia de Tayabas, ahora Quezon, después del cambio de nombre decretado en una ley reciente. En la noche del 12 Diciembre, 1943, a eso de las 9,—relata Rosario Magcawas—estando ya acostados en la cama pero aún despiertos, Eulogio y ella oyeron que alguien llamaba desde fuera, así que aquél se levantó para ver por los intersticios de una ventana quien estaba llamando. En esto tres hombres, cada uno armado de una pistola, irrumpieron por una puerta y entraron en la casa. Estando ya en la sala apuntaron con sus pistolas a Eulogio, diciéndole "No te muevas." De miedo Eulogio alzó ambas manos en señal de sumisión, implorando al mismo tiempo por su vida. Le amarraron ambas manos, y estando ya así atado uno de los asaltantes fué a la puerta por el lado Norte, la cual había sido previamente forzada, y allí en voz baja dijo a Fernando Guevarra que estaba abajo: "Padre, ya está amarrado." Rosario dice que Fernando atisbó entonces por la puerta diciendo: "Matadle ya, disparad." Ella oyó entonces a su marido proferir gritos de dolor, exclamando: "¡Ay, Osay, esposa mía, nuestros hijos!," y cuando volvió la cara para mirar a su marido vió que del ojo derecho de éste manaba sangre. Inmediatamente después ella oyó tres disparos sucesivos dirigidos contra su marido, el cual entonces bamboleó a través de una puerta hácia el *batalán* (caida) donde cayó muerto, acribillado el cuerpo a balazos.

Continuando su relato, Rosario dice que después de haber acabado con su marido los asaltantes le preguntaron a ella dónde tenía guardados su dinero, ropa y alhajas, y ella contestó señalando un baúl que Emilio Guevarra abrió vaciándolo de su contenido mientras su hermano Marcos llevaba la luz y el otro acusado, Ciriaco, recogía y envolvía todo lo vaciado por Emilio del baúl. Entre vestidos, alhajas y pequeñas sumas de dinero filipino y japonés, los asaltantes se alzaron con una presa avaluada en ₱2,660. Según Rosario, antes de marcharse los asaltantes le advirtieron que no diera parte del caso a las autoridades, pues de otra manera la secuestrarían y matarían, pues ellos eran guerrilleros. Las pruebas de cargo tienden a señalar dos motivos en la perpetración del crimen: el robo y la venganza. Se alega que Fernando Guevarra y sus hijos estaban resentidos de Eulogio Laylo por haber éste exigido que Fernando pagase la cantidad de ₱300 antes de avenirse a entregarle la credencial de un caballo que había sido objeto de cierto contrato de compraventa.

Los apelantes, Emilio y Ciriaco Guevarra, niegan haber participado en el asalto objeto de la querella. La única persona que declara haberlos identificado en la noche de autos es Rosario Magcawas, viuda del occiso. La decisión, pues, de esta causa tiene que depender principalmente del valor que se dé a su testimonio. Es perfectamente correcta

la aserción del Procurador General: un solo testimonio, aún sin corroboración, es a veces suficiente para una convicción. Sostiene esta doctrina la imponente lista de citas de jurisprudencia que el Procurador trae en su alegato. Pero condiciona la doctrina un requisito importantísimo, a saber: que el testimonio único pueda resistir al más severo análisis, dado el conjunto de las circunstancias que rodean el caso. De otro modo, una doctrina de no inferior categoría—de la duda razonable—flota y prevalece para amparar al procesado.

Hay en autos ciertas sombras y penumbras que obscurecen, a nuestro juicio, el singular testimonio de la viuda. De resultas del crimen, el 13 de Diciembre fueron arrestados Emilio Guevarra, Ciriaco Guevarra, Marcos Guevarra y Amado Cosico, los dos primeros apelantes supervivientes en esta causa. El 15 de Diciembre Cosico fué puesto en libertad. En la tarde de aquel mismo día 15 Fernando Guevarra (el padre de los Guevarra, ya difunto) fué arrestado. El 17 de Diciembre los policías de Candelaria utilizando como guía a Marcos Guevarra, también ya difunto, aprehendieron a Fernando Isaes, Ismael Isaes y Alejandro Alves. El 21 de Diciembre, el jefe de policía de Candelaria, Leonardo Recio, puso en libertad a los apelantes en esta causa, Emilio y Ciriaco Guevarra, por *falta* de pruebas contra ellos.

El 11 de Enero, 1944, el Fiscal Provincial presentó una querella, por homicidio, solamente contra Fernando Guevarra, Marcos Guevarra e Ismael Isaes. 24 de Enero el Fiscal enmendó la querella convirtiendo la acusación en robo con homicidio, siendo acusados los mismos individuos últimamente nombrados. Nótese que ni en la querella original ni en la enmendada fueron incluídos como acusados Emilio y Ciriaco, los apelantes en la presente causa. No fué sino un mes después, el 23 de Febrero, cuando el Fiscal formuló otra querella por robo con homicidio contra Fernando Guevarra y sus tres hijos los nombrados Marcos, Emilio y Ciriaco. Es de advertir que en la investigación preliminar celebrada el 22 de Febrero se sobreseyó la causa contra Ismael Isaes.

¿Qué significaban todas estas vacilaciones y rectificaciones de los agentes policiacos y aún del mismo ministerio fiscal en relación con Emilio y Ciriaco Guevarra? ¿Por qué se tardó en arrestarlos y, sobre todo, se tardó bastante en querellarlos? Es más: ¿por qué una vez se les había puesto inclusive en libertad por *falta* de pruebas contra ellos? Ello no podía significar más que una cosa: que el Estado no tenía pruebas contra ellos; que no es verdad que la viuda los había podido identificar en la ocasión de autos; porque si fuera cierto, como declaró después en el juicio, que ella

los pudo identificar porque los conocía de antemano, por lo menos de cara, y sabía que eran hijos de Fernando, lo más natural es que ella hubiese revelado inmediatamente este hecho a sus allegados y a las autoridades en vez de dejarlos en suspenso no sólo por días, sino hasta por semanas, al punto de que los agentes del orden hubieron de arrestar a varios individuos que después tuvieron que ser puestos en libertad porque nada tenían que ver con el crimen. Esta viuda no sólo no hizo lo que naturalmente hubiese hecho si fuese verdad que ella pudo identificar a los apelantes como partícipes en el asalto, sino que en tres declaraciones escritas que hizo después del suceso ninguna mención hizo de dichos apelantes o de alguna circunstancia que pudiera inducir a pensar que ella los había reconocido e identificado en la ocasión de autos. La primera de dichas declaraciones fué hecha el 15 de Diciembre, 1943, ante el sargento Eligio Manalo y jurada ante el alcalde Javier; la segunda fué jurada por ella ante el Fiscal el 13 de Enero, 1944, es decir, dos días después de haberse presentado la querella original donde, excusado es decirlo, no figuraban los apelantes Emilio y Ciriaco como acusados; y la tercera fué un *affidavit* prestado por ella ante el mismo Fiscal Provincial el 8 de Febrero, 1944. Una muestra típica de sus primeras manifestaciones—las que se suponen espontáneas por haberse hecho 3 días después del suceso—es lo que ella, la viuda, dijo al citado alcalde Javier cuando éste le preguntó quién o quiénes habían matado a su marido; según Javier, "ella no pudo asegurarme quién porque era de noche."

Así que cuando varias semanas después—primero en la investigación preliminar y después en el juicio—vemos que ella señala ya decididamente a Emilio y Ciriaco Guevarra como partícipes en el aslto, dando una profusión de detalles, como eso de que Emilio fué quien vació el baúl de su contenido mientras Marcos sostenía la luz para alumbrar la escena y Ciriaco envolvía y empacaba el despojo, no tenemos más remedio que quedar maravillados ante la inesperada y estupenda metamórfosis: de un casi completo silencio, *apagón* en punto a datos y noticias, a un cúmulo abundante de pormenores. La oscilación del péndulo es demasiado violenta para que pueda parecernos normal y creíble. La aserción de que las indecisiones, vacilaciones, rectificaciones e incongruencias de la prosecución se debieron a cierta desorientación causada por una supuesta confesión extrajudicial de Fernando Guevarra asumiendo exclusivamente la responsabilidad del crimen juntamente con su hijo Marcos, nos parece harto forzada y hasta fútil para merecer seria consideración.

Por tanto, no habiéndose probado la culpabilidad de los apelantes fuera de toda duda razonable, se revoca la sentencia y se les absuelve de la querella, con las costas de oficio. Así se ordena.

Moran, Pres., Parás, Feria, Pablo, Perfecto, Hilado, Bengzon, Padilla Tuason, MM., están conformes.

Se revoca la sentencia; se absuelve a los acusados,

[No. L–138. September 30, 1946]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* FLORO YBOA ET AL., defendants and appellants

CRIMINAL LAW; ASSAULT UPON AN AGENT OF PERSON IN AUTHORITY; PERSON IN AUTHORITY, WHO IS; OFFICER OF UNITED STATES ARMY.—A "person in authority," referred to in the Revised Penal Code, is a functionary of the Philippine Civil Government, and an officer of the United States Army, though named by the latter as head of what was known as the Philippine Civil Affairs Unit (PCAU) No. 28, designed to render help and assistance to the Philippine Government in a number of matters, is not a person vested with jurisdiction and is not a public officer, who takes part in the performance of duties in the public service of the Philippines, within the purview of the pertinent provisions of the Revised Penal Code.

APPEAL from a judgment of the Court of First Instance of Samar. Melendres, J.

The facts are stated in the opinion of the court.

Lope C. Quimbo for appellants.

Assistant Solicitor-General Alvendia and *Solicitor Luciano* for appellee.

HILADO, *J.:*

Floro Yboa and Antonio Yboa appeal to this court from a decision of the Court of First Instance of Samar finding them guilty of the crime of assault upon an agent of a person in authority and sentencing each of them to an indeterminate penalty of from five (5) months and eleven (11) days of *arresto mayor* to one (1) year, eight (8) months and twenty (20) days of *prisión correccional*, to pay a fine in the sum of four hundred pesos (₱400), with subsidiary imprisonment in case of insolvency, said subsidiary imprisonment in no case to exceed one-third of the principal penalty, and to pay the costs.

The appellants are brothers, Floro being a dentist, and Antonio a driver.

During the first months following the liberation of Samar, the United States Army established in Catbalogan, the capital, its unit known as the Philippine Civil Affairs Unit (PCAU) No. 28, with Captain Myden as supply,

relief, and welfare officer. That unit of the United States Army rendered help and assistance to the Civil Government in a number of matters, principally supplies for civilian relief, health and sanitation, civilian hospitals and medical care, peace and order, re-opening of schools, and appointment of temporary officials. However, the said unit did not thereby become in any sense, a branch or agency of the Commonwealth Government nor of that of the province or of the city or town in which it operated—it continued, for obvious reasons, to be a unit of the United States Army. Its officers and employees were not answerable to the Commonwealth Government nor to that of the province, city, or municipality in whose civil affairs it rendered its help and assistance. They naturaly continued under the exclusive control and discipline of the Army of which they were but a unit. In contemplation of law, it was the United States Army which was, through its said unit, rendering said help and assistance to the Civil Government, and, if we were to hold that the officers and personnel, including the civilian employees, of said PCAU No. 28, became functionaries of the Civil Government while they were rendering the latter said aid and assistance, we would have to hold that the United States Army itself became a part or agency of the Civil Government on the same account, which is, of course, absurd.

Captain Myden's right-hand man at the PCAU office in Catbalogan during the period referred to in this case was the offended party herein, Jose Claudio, who was employed as cashier in the supply office by virtue of an appointment duly extended to him on January 27, 1945. In that capacity he was authorized by his superiors to enforce PCAU rules and regulations.

In early April, 1945, employees of the PCAU in charge of checking up the distribution of relief detected an anomaly involving the Yboa brothers, Floro and Vicente, who were found to be purchasing rations at two different PCAU stores under one and the same ration card, in violation of PCAU rules and regulations. Before April 28, 1945, when the occurrence giving rise to this case took place, appellant Antonio Yboa was informed by his wife that Jose Claudio had been circulating all over the town the talk that Dr. Floro Yboa had committed serious irregularities in the purchase of his PCAU rations. At this, the appellants took offense.

At about 3 o'clock in the afternoon of April 28, 1945, while Jose Claudio was discharging his duties at the supply office of the PCAU in Catbalogan, which was barely 30 yards from the Provincial Capitol, he was told by a fellow employee, named Alejandro Villarin, that Dr. Floro Yboa wanted to see him outside. Villarin transmitted the mes-

sage to Claudio, but as the latter was busy at the time, he asked Villarin to request Dr. Yboa to wait for a while or to come inside if he so desired. Shortly thereafter, the defendant Antonio Yboa asked Villarin to come out of the PCAU office and there Dr. Yboa reiterated to Villarin his request that Claudio be asked in his name to see him outside. Thereafter, Claudio went out of his office to see Dr. Yboa, who, upon seeing the former, started questioning him saying: "Peping, what is this I heard?" At this moment, the defendant Antonio Yboa appeared from behind his brother and without warning struck Claudio with his fist, as a result of which the latter was stunned and fell to the ground. According to the medical certificate of the Director of the Samar Civilian Hospital, who examined and rendered medical assistance to the offended party, the latter suffered a contusion in the interclavicular region which required two days medical attendance.

Before committing the assault the appellant Antonio Yboa had been walking to and fro between the Capitol Building and the supply office of the PCAU for around twenty-five minutes, all this time with his knuckles wrapped with a handkerchief "like a boxer before he inserts his hands in the gloves," in the words of the witness Estavillo. This appellant himself admitted in his testimony that, upon being informed by his wife a few days before the incident, that Claudio had been circulating the talk about his brother Floro, he decided to assault Claudio.

The principal question around which hinges the determination of this case is whether Jose Claudio, the offended party, was, under the facts above narrated, an agent of a person in authority. We find no difficulty in holding that he was not, without prejudice to the imposition of the corresponding penalty for the criminal offense committed by the accused, Antonio Yboa, as hereinafter considered.

It has been settled by former decisions of this court that a "person in authority" referred to by the former Penal Code (whose pertinent provisions have been incorporated in the present Revised Penal Code) is a "functionary of the Civil Government" and that "an officer of the United States is not a person vested with jurisdiction and is not a public officer, who takes part in the performance of duties in the public service of the Philippine Islands" (United States *vs.* Smith, 39 Phil., 533, 537, and cases therein cited). In the same case and on the same page of the cited volume, this court said:

> "We think that the terms 'person in authority' and 'public officer' found in the Spanish Penal Code must be given a restricted meaning so as to include only persons who perform some of the functions of the Government of the Philippine Islands."

In the case of Carrington *vs.* United States ([1908], 208 U. S., 1), the United States Supreme Court said that: "As a soldier he (Carrington) was not an officer of the Philippines, but of the United States."

Captain Myden of the PCAU No. 28 in Catbalogan, Samar, did not cease to be an officer of the United States Army, and therefore of the United States Government, because his duties, as head of said unit, comprised the rendering of assistance and help to the liberated areas within the sphere of his activities in civil affairs. He was still rendering that assistance as an officer and a part of the United States Army. Indeed, his unit was a unit of that Army. As already stated above, for the discharge of those duties, Captain Myden was not answerable to either the Commonwealth Government, the provincial government of Samar or the city government of Catbalogan.

If, then, Captain Myden was not a "person in authority," within the meaning of article 148 of the Revised Penal Code, his right-hand man, Jose Claudio, could not be an "agent of a person in authority," within the meaning of the same article. This leads inevitably to the conclusion that the offense committed could not be that penalized by the said article.

The evidence falls far short of establishing any guilty participation on the part of appellant Floro Yboa in the offense committed by his brother, Antonio, for which reason the former should be acquitted with one-half of the costs *de officio*.

As to appellant Antonio Yboa, the evidence establishes beyond a reasonable doubt that he inflicted upon Jose Claudio physical injuries which required medical attendance for two days and which therefore should be classified as slight physical injuries punishable by *arresto menor* under article 266, paragraph 1, of the Revised Penal Code. We further find from the facts above stated that the commission of the offense was attended by the aggravating circumstances of treachery (People *vs.* Capitania, 49 Phil., 475; People *vs.* Pengzon, 44 Phil., 224) and evident premeditation (United States *vs.* Cornejo, 28 Phil., 457).

Wherefore, reversing the judgment appealed from, we acquit appellant Floro Yboa, with one-half of the costs *de officio*, and convict appellant Antonio Yboa of the crime of slight physical injuries, sentencing him to suffer thirty (30) days of *arresto menor*, with the corresponding accessory penalty, and to pay one-half of the costs. So ordered.

Parás, Pablo, Perfecto, and *Padilla, JJ.*, concur.

Judgment reversed, acquitted as to F. Yboa and convicted as to A. Yboa for slight physical injuries.

[No. L-334. September 30, 1946]

FROILAN LOPEZ, plaintiff and appellee, *vs.* SILVESTRE DE JESUS, defendant and appellant

LEASE; DURATION WHEN NOT STIPULATED; TERMINATION; COMMONWEALTH ACT NO. 689, APPLICABILITY OF; CASE AT BAR.—As the lease did not have a fixed term, it should be considered as one from month to month (the rental being payable monthly) and to have ceased, without the necessity of special notice, upon the expiration of every month. (Article 1581, Civil Code.) Even if, as contended by the appellant, a novation took place when the appellee increased the rent in June, 1945, the lease was still monthly and terminated after said month. Appellee's election to end the lease was unmistakably made known to the appellant when, on July 2, 1945, the latter was asked to vacate. Consequently, after June, 1945, there was no longer any lease that could be affected by section 1 of Commonwealth Act No. 689, which was enacted only on October 15, 1945.

APPEAL from a judgment of the Court of First Instance of Manila. De la Rosa, J.

The facts are stated in the opinion of the court.

Arturo Zialcita for appellant.
Gamboa & Enverga for appellee.

PARÁS, *J.:*

The plaintiff is the owner of an apartment known and identified as No. 2227 Rizal Avenue, Manila. This apartment has been occupied by the defendant since September, 1940, under a verbal contract of lease calling for a monthly rental of ₱35 payable in advance, which was raised by the plaintiff to ₱44 in June, 1945. On April 2, 1945, and again on July 2, 1945, the plaintiff gave notice to the defendant for him to vacate the premises. Defendant's failure to do so led to the filing, on July 9, 1945, by the plaintiff of an action for ejectment in the municipal court of Manila which, after trial, handed down a decision in favor of the plaintiff. The defendant appealed, but the Court of First Instance of Manila, in which the parties submitted a stipulation of facts, rendered a judgment for restitution and the payment of the monthly rental of ₱44 beginning June 1, 1945.

Appealing again, the defendant—through his counsel—argues that the action for ejectment was prematurely instituted and that, at least on equitable considerations, he should be allowed to stay.

Section 1 of Commonwealth Act No. 689 provides that "A lease for the occupation as dwelling of a building or part thereof which is not a room or rooms of an hotel, which does not specify any term, shall be considered of six months' duration counted from the date of occupation by virtue of said lease at the option of the lessee." It is

now the theory of the appellant that since the period of his lease was not specified, he has the right to remain as lessee for at least six months from June 1, 1945, when the rental was increased to ₱44—an act which resulted in a novation of the original lease.

Counsel for the appellant is mistaken. As the lease did not have a fixed term, it should be considered as one from month to month (the rental being payable monthly) and to have ceased, without the necessity of special notice, upon the expiration of every month. (Article 1581, Civil Code.) Even if, as contended by the appellant, a novation took place when the appellee increased the rent in June, 1945, the lease was still monthly and terminated after said month. Appellee's election to end the lease was unmistakably made known to the appellant when, on July 2, 1945, the latter was asked to vacate. Consequently, after June, 1945, there was no longer any lease that could be affected by section 1 of Commonwealth Act No. 689, which was enacted only on October 15, 1945, even assuming that said law is applicable to a legal relation that came into being prior to its enactment.

From the equitable viewpoint, appellant's case cannot also prosper. He might have been an old tenant now facing the difficulty of finding another house, but this circumstance cannot nullify the legal rights of the appellee and his family who have been admittedly "compelled to live upon the charity of some friend who generously offered them temporary shelter in his house which is overcrowded, to say the least."

The appealed judgment is affirmed, with costs against the appellant. So ordered.

Pablo, Perfecto, Hilado, and *Padilla, JJ.,* concur.

Judgment affirmed.

[No. L–340. September 30, 1946]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* TOMAS BAQUINO ET AL., defendants. EMILIANO BELTRAN, appellant.

CRIMINAL LAW; MURDER; WITNESSES, CREDIBILITY OF; LACK OF MOTIVE TO TESTIFY FALSELY; CASE AT BAR.—Under the facts stated in the opinion, the conviction for murder was affirmed, the court holding that no reason or motive was shown why V. and J. L. should falsely implicate the appellant in the heinous crime of murder; that their testimony bears the earmarks of truthfulness: natural, logical, straightforward, given with all candor; that the fact that for some moment they were about 200 meters from the scene of the shooting cannot affect their assurance of having identified the appellant among the killers; that farmers usually have good eyesight for great distances, much better than city dwellers; that the defense of alibi interposed by the appellant is not convincing.

APPEAL from a judgment of the Court of First Instance of Manila. Jugo, J.

The facts are stated in the opinion of the court.

Senador & Justalero for appellant.

Assistant Solicitor-General Kapunan, Jr., and *Solicitor Palma* for appellee.

PERFECTO, *J.*:

Emiliano Beltran is accused with Tomas (Tomansing), Venancio and Pedro, all surnamed Baquino, of the murder of Feliciano Lopez, committed in the afternoon of August 9, 1945, in the barrio of Bahay-Toro, Quezon City. His co-defendants being still at large, trial proceeded only against Beltran. On January 21, 1946, Judge Fernando Jugo of the Court of First Instance of Manila sentenced him to suffer the penalty of *reclusión perpetua*, to indemnify the heirs of the deceased in the sum of ₱2,000, and to pay the costs. From this judgment, Beltran appealed.

Victor Lopez, 71 years old, widower, farmer, testified that his son Feliciano Lopez died in a field in the barrio of Bahay-Toro on August 9, 1945. He was attacked by four persons, "although I do not know who actually shot him. They were Emiliano Beltran, Venancio Baquino, Tomansing Baquino, and Pedro Baquino. We lost a carabao and somebody tipped my deceased son that it was Tomansing, who carried away our carabao." Feliciano went to see Tomansing and asked him about the carabao. Tomansing denied knowledge of the lost carabao. Feliciano hit him. "As I saw Feliciano hitting Tomansing, I went to them and stopped them, telling my son: 'That's enough! Come let us go and look for the carabao instead; the carabao might go away and we may not be able to find it.' After that we left and it was Tomansing's turn to look for us, but he only saw my deceased son and did not see me. Upon seeing my son he and his companions helped each other in attacking him. While I was at a distance—some distance—from them I heard my son shouting, saying that he was being maltreated. So we approached and as we were approaching the four persons fired shots. I don't know whether or not my son was killed because I ducked. I was at a distance of about 200 meters." Witness was with his son, named Jose. "Emiliano Beltran was carrying with him a Garand rifle and his three companions were carrying carbines. After the shots had been fired I saw the aggressors leaving and then I got up and went to Feliciano. He was already dead. I saw that he was hit in the forehead and about the left ear. I removed his body from the water and took him to a rice paddy (pilapil). As some people came

to me I asked their favor to help me carry the body of my son to the house. Jose went to an American camp for help. The Americans sent M.Ps." They "took the corpse to the San Lazaro Hospital." The shooting took place "about three or a little past three o'clock in the afternoon. At the beginning I was at a distance of 200 meters from the scene of the incident, but as I have already told you, when I heard the shots I was then going to approach them to give help to my son, and I was at that distance of 20 meters when the firing was over. What I heard at the start was only a scream and it was while we were approaching that I heard shots." The missing carabao was finally found, after some arrangements. "The arrangement was that we both should excuse each other—on the part of Tomansing for taking the carabao, and my son for beating Tomansing after accusing him for taking the carabao." The carabao was recovered from "the forest where it was tied." At the time the arrangements were being made Tomansing was not present. Only his father was there. The arrangements were made at about 2:30 o'clock in the afternoon at a place about 100 meters away from the scene of the shooting. After the arrangements "we got a rig and started for home. When we were already at Gulod I heard shots." The witness recognized the four attackers "because I have known those boys since their childhood." (T. s. n., pp. 2–13.)

Jose Lopez, 23 years old, married, farmer, son of Victor Lopez, testified that in the afternoon of August 9, 1945, he was looking for a carabao. His brother Feliciano told him that somebody tipped him that it was Tomansing who got the carabao, "thereupon, we went to see Tomansing in the field. My brother struck Tomansing and asked him: 'Where is our carabao? Somebody told me that you got it.' He beat him with a piece of wood. As Tomansing refused to tell us where the carabao was we left him and proceeded to look for the carabao. In the meantime Tomansing ran away. Feliciano went to one part of the field and I went to another part to look for the carabao. Later I found the carabao and led it home. Then I started back for the field to let Feliciano know that I had already found the carabao. When I saw Feliciano he was being attacked by the four men—Emiliano Beltran, Tomansing, Venancio and Pedro, some of them hitting him with fist blows, some pulling him and others striking him with their guns. Emiliano Beltran was holding a Garand." The three others "were holding carbines. Emiliano was saying: 'Let us finish him; let us kill him; here comes his brother.' Then they started firing at him and at the same time firing at me and my father. I saw my

father ducking first, and then I ran away to the American camp to inform the soldiers there of what was happening. Emiliano was the first to shoot my brother and when my brother fell Tomansing fired another shot." The witness heard what Beltran said because "there was quiet in that place." The witness knows Beltran and the three Baquino's since childhood. "As I was running toward the camp shots were being fired at me and upon reaching the camp I told the Americans there that some laborers were killing my brother and if possible to send some help. Then I went back to the field. On my way I met my father and several people carrying the body of my dead brother on a bamboo bed" already dead. The witness was able to identify the four attackers "because I have a good eye-sight. Moreover, I have known them since our childhood. As a matter of fact Emiliano Beltran used to cut my hair." (T. s. n., pp. 18–29.)

Agripino Dumlao, 33 years old, married, detective, Manila Police Department, testified that Bahay-Toro, where the shooting took place, is located in Quezon City, under the jurisdiction of Precinct No. 3, San Juan. He was able to recover 3 clips of Japanese ammunition in a barrel where palay was in the house of accused Beltran, who told him that he found them on the way during the Japanese occupation and kept them. The clips contained 15 rounds of ammunition used for Japanese rifles. (T. s. n., pp. 34–37.)

Leonard W. Jarcho, 29 years old, single, Captain, Medical Corps, Manila Police Department, identified Exhibit A as a copy of the official autopsy report in the case of Feliciano Lopez performed by Captain Fuller under his direction. The wounds of the deceased were "the result of two gunshot wounds on the head, with considerable extrusion of the brain. The cause of the death of the victim was shock, secondary to multiple fractures of the skull and extrusion of a large portion of the brain." In photograph Exhibit B appears the picture of Feliciano Lopez and Captain Fuller, the officer who performed the autopsy. (T. s. n., pp. 39–44.)

Simon Galfiera, 35 years old, married, farmer, as defense witness, testified that on August 9, 1945, he was in his farm. "I was raking the farmland. We were three." His companions were Emiliano Beltran and Juan Cadaing. "We started to work at 8 o'clock on the morning of that day." Beltran arrived at about 8:30 o'clock in the morning. The witness remained in the farm until 5:30 in the afternoon. The farm belonged to Apolonio Baitiong from Balintawak. Beltran "was also raking the farmland with

me." He left the place at "about 5:30 o'clock in that afternoon." From 8:30 in the morning to 5:30 o'clock in the afternoon of that day, "he was with us." On the following day, the witness, Cadaing and Beltran raked the farmland of Cadaing. Beltran's behavior was natural as on previous days." (T. s. n., pp. 51–55.)

On being asked on cross-examination when he came to learn about the arrest of Beltran, witness answered: "I don't remember the date. I think that was last month—October. I came to know about it only when I received a letter from the police authorities." He received the letter from the police authorities about the first week of October. Questioned as to the last time he met Beltran before the latter's arrest, he answered: "We did not meet anymore after the work was over, as each of us had to work for himself." But immediately after he declared that after August 9, 1945, he used to meet Beltran at stores and "as we know each other, we greet one another whenever we meet. Most of our meetings were on Sundays." But on being asked when was the last time that he met Beltran on a Sunday, he answered: "That was long ago and I cannot now recall the days." Asked to give the approximate days when he met Beltran for the last time, he replied: "May be in September. I cannot remember the date." (T. s. n., pp. 63–65.)

Juan Cadaing, 32 years old, married, farmer, testified that on August 9, 1945, he was working in the land of Simon at Talipapa. He was plowing the land with Simon and Emiliano Beltran. They began working between 8 and 8:30 in the morning and ended at between 5 and 5:30 in the afternoon. On August 10, 1945, he plowed his own land with Simon and Beltran beginning from 8 to 8:30 in the morning and ending at 5 to 5:30 in the afternoon. (T. s. n., pp. 69–75.)

While Galfiera testified that he has been working the farmland owned by Baitiong for the last ten years, and that in the work Beltran "has been helping him for the last two years now" (t. s. n., p. 56), Cadaing declared on the other hand that Beltran had worked in said land and in his only on August 9 and 10, 1945 (t. s. n., p. 76). Furthermore, in Cadaing's testimony, we read:

"Q. Had you the opportunity of seeing accused Emiliano Beltran in the month of October of this year?—A. No, sir.

"Q. When was the last time you saw Emiliano Beltran?—A. The last time I saw Emiliano Beltran was on October 31.

"Q. Of this year?—A. Yes, sir." (T. s. n., p. 79.)

Emiliano Beltran, 33 years old, married, farmer and barber, denied having assassinated Feliciano Lopez on August 9, 1945, and declared that on said date he was in

the land of Simon plowing in the company of Juan and Simon. He arrived at the place at 8:30 o'clock in the morning. Simon was already there, and he and Juan arrived at the same time. He remained until 5:30 o'clock in the afternoon. The next day he worked on the land of Juan upon invitation of the latter. He knows Victor Lopez, and Jose and Feliciano Lopez, the latter two since their childhood. He did not meet them on August 9. He was arrested on the 24th of September. His wife, Filomena Diego, is a cousin of Tomas Baquino. He knows Tomas, Venancio, and Pedro Baquino. Recognizing Exhibit C as his statement, where he appears to have declared that he retired to his house at 7 o'clock p. m. on August 9, 1945, and not at 5:30 o'clock as he had testified in court, he said that he made the declaration "because I was afraid, as it was the first time I have appeared before the authorities, and on that occasion, that Pepe (pointing to Jose Lopez) and others gave me fist blows." (T. s. n., pp. 81–90.)

Agripino Dumlao, the detective who took the statement of the accused marked Exhibit C, belied the accused's declaration to the effect that he was maltreated when the statement was taken. (T. s. n., p. 93.)

Upon the evidence presented by both parties in this case, we are convinced that Beltran was among the four assailants who attacked and killed Feliciano Lopez, the motive for whose killing being his having beaten with a piece of wood Tomas Baquino, also known by the name of Tomansing. Tomansing had strong reasons for taking revenge, he having been twice offended by Feliciano Lopez, first by imputing upon him the theft of the carabao, and second by beating him with a piece of wood, without any chance on his part of immediate retaliation due to the fact that he was alone while Feliciano was accompanied by his brother Jose. Smarting under such a strong resentment, it is but natural for him to summon the help of Venancio and Pedro Baquino, with whom he must be related—although the records do not disclose the grade of relation—and Emiliano Beltran, the husband of his cousin. And Tomansing was able to summon the immediate help of his relatives because of the well-known clannish solidarity prevailing among kins. Beltran, since his childhood, is an acquaintance of Victor Lopez and his son Jose. As a barber, he used to cut the hair of Jose. No reason or motive was shown why Victor and Jose Lopez should falsely implicate Beltran in the heinous crime of murder under our consideration. Their testimonies bear the earmarks of truthfulness: natural, logical, straightforward, given with all candor. The fact that for some

moment they were at about 200 meters from the scene of the shooting cannot affect their assurance of having identified Beltran among the killers. The distance of 200 meters is just a mere estimate. They were approaching the scene. Farmers usually have good eyesight for great distances, much better than city dwellers. Although Victor is 71 years old, it is a well-known fact that nearsightedness generally afflicts persons leading a sedentary life, not those living in the farm.

The defense of alibi interposed by the accused is not convincing. The testimonies of the two witnesses presented by the defense to the effect that from 8:30 o'clock a. m. to 5:30 o'clock p. m. on August 9, 1945, the accused was working the farmland of Simon Galfiera, belong to the class of evidence that some well-intentioned people are wont to offer because, while helping a friend, they do not assume much responsibility, it being difficult to contradict or belie them. Although they categorically testified that on August 9 they had Beltran in their company, both witnesses appeared on cross-examination not so sure as to their recollection about dates. Simon Galfiera, as an instance, could not mention the date of his last meeting with Beltran, and there is no convincing special reason why he should recollect August 9 and 10.

The penalty imposed by the lower court being in accordance with the provisions of article 248 of the Revised Penal Code, punishing the crime of murder committed by the appellant, is affirmed, with costs against said appellant.

Moran, C. J., Parás, Bengzon, Padilla, and *Tuason, JJ.*, concur.

FERIA, *J.*, dissenting:

I dissent from the majority and vote for the reversal of the sentence and acquittal of the appellant for the following reasons, besides those set forth in the other dissenting opinions.

The guilt of the appellant in the present case depends entirely upon whether it was possible for the witnesses for the prosecution Victor and Jose Lopez, father and brother, respectively, of the deceased, to have properly identified the appellant at the time and place of the commission of the offense.

The judgment of conviction of the lower court is based on the conclusion that, "at a distance of 20 meters, Victor heard other shots and saw four men beating his son Feliciano. He recognized them as he was very familiar with their faces." But there is nothing in the record to warrant such a conclusion. What the two witnesses testified was that they heard shots and recognized the

assailant of the deceased at a distance of 200 meters. For that reason, the majority, in discussing this cardinal point on which the sentence of conviction rests, does not rely on said unwarranted conclusion of the court *a quo*. It says the following: "No reason or motive was shown why Victor and Jose Lopez should falsely implicate Beltran in the heinous crime of murder under our consideration. Their testimonies bear the earmarks of truthfulness: natural, logical, straightforward, given with all candor. The fact that for some moment they were at about 200 meters from the scene of the shooting can not affect their assurance of having identified Beltran among the killers. The distance of 200 meters is just a mere estimate. They were approaching the scene. Farmers usually have good eyesight for great distances, much better than city dwellers. Although Victor is 71 years old, it is a well-known fact that nearsightedness generally afflicts persons leading a sedentary life, not those living in the farm."

But a cursory analysis of the above grounds or reasons set forth in the majority decision will clearly show that they fall by their own weight.

(*a*) *Lack of motive to testify falsely.*—The fact that "the record does not show any motive why Victor and Jose Lopez should falsely implicate Beltran (the appellant), in the heinous crime of murder under consideration," can not be adduced as an argument or reason that the testimony of these two witnesses for the prosecution should be given more credence. It is true that where the evidence shows that there is reason or motive for a witness to testify falsely against an accused, such showing affects adversely the witness' testimony; but it is also true that, aside from psychological circumstances which may hamper a correct perception of an event and motivate a person to perceive or believe to be true a thing which is not true, the mere absence of such evidence or motive does not add an iota to or enhance the credibility of a witness, for a person is presumed to tell the truth; unless the contrary is shown, or the impossibility or improbability for a witness to have been able to correctly perceive the fact to which he is testifying necessarily makes his testimony unbelievable.

(*b*) *Physical impossibility of identifying a person and hearing what he says at a distance of 200 meters.*—It is of common experience, and therefore of judicial notice, that it is physically impossible to recognize or identify a person, or hear and understand what he is saying even in a loud voice, at a distance of 200 meters. The witness Jose Lopez has repeatedly stated in the course of his testimony (pages 23, 27, 29, 32 and 33), that at a distance

of *about 200 meters* he recognized the appellant in sleeveless undershirt, salmon color holding a garand and his companions carrying a carbine each, and heard him say in a loud voice "Let us finish him, let us kill him;" and added that at that distance, "they started firing at him (referring to his brother, the deceased) and at the same time started firing *at me and my father, I saw my father ducking first and then I ran away to the American camp* to inform the soldiers there of what was happening (pp. 22, 23, t. s. n.—Italics ours).

The other witness, Victor Lopez testified also that he recognized the appellant Emiliano Beltran at a distance of 200 meters, on pages 5, 9, 13, and 15; and declared "I was at a distance of 200 meters from the scene of the shooting when I ducked because shots were fired at me" (p. 13); that "while the shots were being fired I was ducking and I could not have seen who actually shot him," his son Feliciano (page 14); and that *"after the shots had been fired I saw the aggressors leaving and then I got up and went to Feliciano."* (p. 6, t. s. n.—Italics ours.)

This witness has mentioned the distance of 20 meters only twice in the course of his testimony, but did not say that he recognized the appellant at that distance. The first time, in answering the query: "My question is were you at that distance of 200 meters when you saw your son being shot?"; but it is apparent that he meant to say 200 meters, otherwise his very answer would be contradictory with itself; for his answer is as follows: "I said that I was *at that distance when I heard shots, and after hearing the shots we* hesitated to approach my son, and as *we* were approaching and at a distance of *20 meters* from them I *heard shots*" (p. 13, t. s. n.—Italics ours).

And the second time, when in his answer to the question: "Why did you state before that you saw the shooting when you were at a distance of 200 meters, and not 20 meters as you have just stated now?" he said: "At the beginning I was at a distance of 200 meters from the scene of the incident, but as I have already told you, when I heard the shots I was then going to approach them to give help to my son, and I was at that distance of 20 meters *when the firing was over*" (page 9). But this is an explanation which does not explain, for he testified a short while before (page 6) that when they were firing at him and his son Jose, he ducked, and "after the shots had been fired I saw the aggressors leaving and then I got up and went to Feliciano" (the victim). If he got up and went to where Feliciano was shot after the firing had ceased and the aggressors or assailants had left the place, he could not have been nearer to the appellant and companions than the

original distance of 200 meters. Besides, it would have been highly incredible if the witness had testified that he had approached the scene while they were firing at him.

(*c*) *Witness did not approach and recognize appellant at less than 200 meters distance.*—None of the two witnesses, Jose and Victor Lopez, testified that they recognized the assailant, at a distance less than 200 meters, while they "were approaching the scene." They repeatedly asserted that they recognized him at a distance of 200 meters, and according to their own testimony just quoted they did not and could not get nearer while the appellant and his companions were at the scene of the crime.

(*d*) *In case of doubt, testimony should be considered in favor of accused.*—The reasoning or argument of the majority that "the distance of 200 meters was a mere estimate," and therefore, by implication, it may and must have been less than said distance so as to enable the witness to recognize the appellant, can not be legally adduced, because it runs counter to the presumption of innocence in favor of an accused in a criminal case. As a corollary to the presumption of innocence in favor of the accused, should there be any doubt as to the correctness of the testimony of a witness, it should be resolved in favor of, and not against, the defendant. Therefore, if there is any doubt as to whether the distance was more or less than 200 meters, it must be decided in favor of the appellant, that is, that it was not less than 200 meters.

(*e*) *No ground for taking judicial notice that farmers have good eyesight.*—There is absolutely no ground for taking judicial notice that "farmers usually have good eyesight for great distances, much better than city dwellers." Although Victor is 71 years old, it is a well-known fact that nearsightedness generally afflicts persons leading a sedentary life, not those "living in the farm." As we have already stated, it is a physical impossibility for a human being to be able to identify or recognize a person or hear and understand what he says in a loud voice from a distance of 200 meters. Besides when Victor was asked during the trial by the fiscal where the accused was, he answered "He is there (pointing out Emiliano Beltran), I have a poor eyesight." (P. 4, t. s. n.)

When Victor Lopez was asked: "I remember you having stated a while ago that you were complaining about your sight when you were asked to identify the accused Emiliano Beltran. Can you tell us positively that you could distinguish a garand from a distance of 200 meters?" He answered: "Because the sun-light in this room is in front of me and my sight is glared by the light." And lastly, upon being asked again "If you are now placed at a distance

of 200 meters from an object, or, let us say, a man, are you sure you can identify the man?" Victor Lopez testified: "Yes, especially when I know the person to be identified, because although at times my eyesight is poor and I find some difficulty, yet at other times my sight is alright." (Page 5, t. s. n.) It is evident that these explanations of Victor Lopez' admission that he had a poor eyesight does not explain away at all said admission, because a poor eyesight has nothing to do with the glare of the sun light; and although it may be relatively better sometimes, it can never be as good as a natural one.

PABLO, *M.*, disidente:

Disiento. Una decisión que condena al acusado a una pena tan grave como la de reclusión perpetua debe fundarse en el testimonio de testigos que no sean de dudosa veracidad.

Victor López de más de 71 años de edad, que se quejaba de tener mala vista cuando se le mandaba identificar al acusado Emiliano Beltran durante la vista, aseguró que estaba a 200 metros de distancia cuando vió a su hijo Feliciano gritar diciendo que le estaban maltratando; que conoció a los que maltrataban a su hijo a la distancia de 200 metros, especificando sus nombres y las armas que llevaban; que estaba a 200 metros cuando oyó el primer disparo; que se acercó a su hijo corriendo para ayudarle y estaba ya a la distancia de 20 metros cuando terminaron los disparos. Este mismo testigo aseguró que los cuatro acusados disparaban tiros contra él y su hijo José, y por eso él se escondió como un pato. ¿Cómo podía llegar el testigo a 20 metros de distancia del lugar en que cayó muerto su hijo, si él se escondió? Como el terreno era palayal, no había nada que podía escudarle fuera de los diques (pilapiles). Para esconderse tenía que zambullirse: no podía correr. Pero desmintió a sí mismo cuando, a una pregunta, contestó: "while we were running toward them I saw Emiliano Beltran getting hold of Feliciano and his three other companions were attacking my son Feliciano."

José López, hermano del ociso, declaró:

"Q. How far were you from the place where your brother Feliciano was being dragged by the four men named by you, including Emiliano Beltran?—A. About 200 meters.

"Q. How were you able to hear those words 'Utasin na, utasin na,' uttered by Emiliano Beltran, at that distance of 200 meters?—A. Because he was saying those words in a loud voice and there was quiet in that place, so I could hear distinctly the words 'Let us finish him; let us kill him.' "

Si el acusado estaba sujetando a Feliciano mientras sus compañeros atacaban a éste, ¿qué necesidad tenían de decir en voz alta, pregonando su deseo de matar, si cada uno estaba al lado de los demás? ¿Será porque querían ser

oídos por los testigos para que puedan declarar contra ellos ante el Juzgado?

La distancia de 200 metros ha sido declarada muchos y repetidas veces por ambos testigos, padre e hijo. Su repetición insistente da lugar a graves dudas.

Si los testigos, padre e hijo dijeron ya a las autoridades policíacas quiénes fueron los autores del crimen, ¿qué necesidad tenía el policía Dumlao de hacer investigaciones? Lo más probable fué que los policías no estaban satisfechos de los informes dados por ellos.

Si los testigos presenciales del crimen, padre e hijo estaban ya a disposición de las autoridades desde la tarde del 9 de agosto, en que presenciaron el asesinato, ¿por qué sólo se presentó la querella en 27?

En mi opinión, las pruebas presentadas no establecen, fuera de toda duda, la culpabilidad del acusado apelante. La querella debe ser sobreseída.

HILADO, *J.*, dissenting:

For the same reasons set forth in the dissenting opinion of Justice Briones, with the sole qualification presently to be stated, I dissent. Although, as I construe the evidence, Victor Lopez, father of the deceased, seems to have merely ducked instead of actually hiding when the supposed assailants of his son, Feliciano, were firing shots at him and his son Jose, when they were at a distance of two hundred meters from the scene of the shooting (t. s. n., pp. 5, 6), I concur in all other respects in the reasons upon which the said dissenting opinion is based. I, therefore, vote for the reversal of the judgment appealed from and the complete acquittal of the appellant, with costs *de oficio*.

BRIONES, *M.*, disidente:

A nuestro juicio, la culpabilidad del acusado no se ha probado fuera de toda duda razonable; así que procede su absolución.

(*a*) Los principales testigos de la acusación son Victor López y José López, padre y hermano del occiso respectivamente. Frente a sus testimonios algún tanto obscurecidos por el interés natural del parentesco, tenemos las declaraciones de dos personas desinteresadas, Simón Galfiera y Juan Cadaing, quienes aseguran positivamente que a la hora en que tenía lugar el crimen el acusado estaba con ellos arando en el campo. Las declaraciones de Galfiera y Cadaing aparecen en autos llenas de candor y naturalidad, como de testigos bien avenidos con la verdad. Creemos que la coartada ha quedado bien establecida.

(*b*) Resulta de las pruebas de la acusación que poco tiempo antes del incidente Victor y José López habían

tenido una especie de conferencia con los parientes del acusado Tomás Baquino (*alias* Tomansing), al parecer para dar explicaciones y satisfacción por el maltrato que éste sufrió en manos del occiso. Pues bien; el acusado y apelante, Emiliano Beltrán, no estaba en aquella conferencia; Victor y José no mencionan, al menos, su nombre como uno de los presentes. Así que nos parece extraña, y hasta inverosímil, la aserción de que Beltrán participó súbitamente en el asalto, sobre todo teniendo en cuenta que este hombre vivía—en ésto no hay discusión—a 5 kilómetros de distancia del sitio de autos.

(*c*) Nos parece inverosímil que Victor, un hombre de 71 años de edad, que admite tener una pobre vista, haya podido distinguir bien las facciones del apelante, máxime si se considera que psicológicamente no existía un dato antecedente inmediato, pues ya sabemos que Beltrán no estaba en la citada conferencia. Nos parece igualmente inverosímil lo declarado por José López de que a 200 metros de distancia él vió a Beltrán hacer el primer disparo acertándole al occiso, teniendo en cuenta la excitación del momento y la probable confusión tumultuaria (según la acusación, había cuatro asaltantes, todos armados), y considerando, además, que, según el testigo, la maleza en el lugar era bastante crecida, tanto que él no pudo distinguir la clase de pantalones que llevaba el apelante.

(*d*) Nos parece más inverosímil lo declarado por José López de que a dicha distancia de 200 metros él oyó a Beltrán hostigar en voz alta a sus compañeros para finiquitar al occiso. *El que trata de probar demasiado, a lo mejor no prueba nada.* ¿Por qué Beltrán había de dar voces de mando, gritando con toda la fuerza de sus pulmones? No se ha demostrado en autos que Beltrán tuviese algún motivo particular para ensañarse contra el occiso: él no es más que un pariente por afinidad de los Baquinos, casado con una prima de éstos, y no sabemos que él tuviese algún agravio personal que vengar contra los López.

(*e*) Otra circumstancia que nos inclina a dudar de la culpabilidad del apelante es que mientras sus coacusados los tres Baquinos se pusieron a la fuga y parece que no han sido aprehendidos hasta ahora, Beltrán se quedó tranquilamente en su casa, como un hombre a quien no le remordía la conciencia y no temía enfrentarse con la justicia. Esta conducta riñe con el papel de cabecilla del grupo que las pruebas de cargo le atribuyen.

Se revoca la sentencia apelada.

Judgment affirmed.

[No. L-357. September 30, 1946]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* ALFONSO DE LA CRUZ ET AL., defendants. JOSE ROCES, appellant.

CRIMINAL LAW; THEFT OR ROBBERY; MITIGATING CIRCUMSTANCES; LACK OF EDUCATION.—The mitigating circumstance of lack of education does not apply to crimes of theft or robbery.

APPEAL from a judgment of the Court of First Instance of Iloilo. Blanco, J.

The facts are stated in the opinion of the court.

Octavio F. Basa for appellant.

Assistant Solicitor-General Alvendia and *Solicitor Lacson* for appellee.

TUASON, *J.:*

This is an appeal from a judgment of conviction for robbery by which Alfonso de la Cruz, who did not appeal, and Jose Roces, present and sole appellant, were sentenced to suffer imprisonment of not less than four (4) years, two (2) months and one (1) day, *prisión correccional,* nor more than twelve (12) years and one (1) day, *reclusión temporal,* with the legal accessories, to indemnify Cirilo Pamplona in the sum of ₱796, and each to pay one-half of the costs.

On the night of January 18, 1946, three men came to the home of Cirilo Pamplona in barrio Baras, in the municipality of Barotac Nuevo, Province of Iloilo. All the inhabitants of the house had gone to bed when Pamplona was awakened by the call of a man who asked for food. The door of the house was not bolted because Cirilo's oldest son was still out. Pamplona looked out the window and saw two men seated at the dining table and one standing in the yard. Unsuspecting, and believing that the strangers really needed something to eat, he told his wife to feed them. What happened from this point is thus related by the complainant:

"It turned out that we had no more cooked rice; my wife measured raw rice to cook for these people; we lighted a lamp to have light; and suddenly this tall man (De la Cruz) leveled his gun at me and said, 'Do not move'; I did not move, I crossed my arms; then this young mestizo (pointing to accused Roces) came up also; then there were two of them upstairs already; Roces said, 'Hurry up with the light'; then with the light and the flashlight which the two accused brought with them they searched the interior of our house; this mestizo Roces (indicating the accused Jose Roces) prodded with the

point of his carbine the back of my wife telling her, 'Open the wardrobe, if not, I shoot you'; my wife out of fear opened the small wardrobe which we had; Roces told my wife, 'Take out the money, and give it to me'; my wife begged saying, 'Son, we have no money; we are laborers, and we have neither land nor carabao'; but Roces insisted saying, 'Do not lie; we know that you have money'; this tall man (pointing to accused De la Cruz) followed me with his gun aimed at me; I did not move out of fear; a little later their other companion came up, wearing short pants; he was as short as this mestizo Roces; and that unidentified man, who is not now here, was the one who found our money and the few jewels that we had. After these two accused and their companion had gotten hold of our money and jewels they got a piece of rope, tied my hands behind my back and gagged me with an apron; afterward they tied also my wife's hands behind her back, and later this mestizo Roces fetched a woman's dress in the room and with that dress gagged my wife in order that she could not scream; and afterward the three went down."

Pamplona further testified that De la Cruz was armed with a Thompson, if he was not mistaken, Roces with a carbine, and the third man with a bayonet. A bayonet, which was introduced as Exhibit A, was identified by him as the bayonet just referred to, and the dagger Exhibit B as among his personal belongings and cash which the robbers carried away. The total amount of the property and money taken was ₱819, according to the witness.

Adela Pamplona, Cirilo's daughter aged 11 years, testified substantially in the same vein as her father.

Antonio Bagaforo, a member of the military police, stated that, having received information that two suspicious looking persons were strolling in barrio Tabog Saba, in the municipality of Barotac Nuevo, he and a companion, upon instruction of his sergeant, proceeded to the place indicated, and as they were about to cross a broken bamboo bridge in that barrio, they spotted the two accused. When the defendants saw them coming, De la Cruz and Roces started to flee, but they (officers) grabbed them and took them to the headquarters for questioning. When the prisoners were searched, a bayonet (Exhibit A) was found in Roces' pocket, and a dagger (Exhibit B) on Alfonso de la Cruz's waist.

The defendants set up an alibi. They testified that all night on January 18 they were in barrio Acquit, Barotac Nuevo.

Juan Discipulo declared that the two accused and Angel Ludero called at his house and that after he and his family finished their supper, the three visitors, who had brought

a can of salmon, ate theirs. After eating, the defendants and Ludero went out to attend, so they said, a dance in Tabog Anday-hagan in barrio Acquit. It was about 9 o'clock when they departed, but he could not tell what time they came back that night.

Librada Paraico testified that she lived about twenty meters away from Juan Discipulo's home. Often volunteering answers which were not asked, she declared that she saw the two accused on the night of the 17th, and again on the night of the 18th eating in the house of Juan Discipulo, after which, at about half past nine, they stepped out to go to a wedding party; that, from the party the defendants came back and asked for Juan Discipulo; that, as Juan Discipulo was already asleep, they wanted to pass the night in the school house; that she invited them to sleep in her house because in the school building there were no mats, pillows nor blankets, and because "poor Alfonso" (De la Cruz) had just recovered from illness. She swore that the two accused did not leave her house that night because she closed and tied the door. She said, however, that she slept all night and was not watching her guests.

Angel Ludero, a school teacher in barrio Acquit, declared in essence that he was with the two defendants on the 17th, the 18th and the 19th of January, 1946.

Of the three witnesses who gave evidence for the defense, only Juan Discipulo has impressed us as being truthful. But his testimony is not so air-tight as to be incompatible with the hypothesis that the defendants were the authors of the crime herein charged. As to the other two witnesses, these betrayed signs of being uncertain of some of their statements; in several instances they withdrew or changed their answers immediately after they had been given. And although there is not the slightest proof to bear out the hints that Angel Ludero was the third man of the gang that broke into Pamplona's home, it is certain that he was very partial to the accused, was their intimate and close friend, and was in their company in their loafing and rambling. The defendants were from other municipalities and had no visible means of livelihood.

For the rest, Pamplona and his daughter were positive of the identity of the two accused; and they could hardly be mistaken, for the malefactors were undisguised and there was a lighted lamp when they ransacked the house and gagged and bound Pamplona's and his wife's hands. It may be added that, although the night in question was the first time Pamplona laid eyes on the defendants, Cirilo's daughter assured the court that before that date she had seen Roces several times pass in front of the school she was attending.

Without going farther, there are two outstanding facts which explode the defense of alibi and leave no room for doubt of appellant's guilt. Alfonso de la Cruz's conformity with the decision which imposed on him a heavy penalty may be logically interpreted as an acknowledgment of the commission of the crime. And the finding in this defendant's possession of the dagger stolen from Pamplona's home, Exhibit B, a few days after the crime was perpetrated, constitutes a strong if not conclusive corroboration of the robbery victims' testimony. It would be argued perhaps that Alfonso de la Cruz's guilt should not be confounded with Roces'. Against this possible argument, it should be remembered that according to defendants' own evidence De la Cruz and Roces never separated from each other since the 17th or before and that they presented a common defense based on the same set of evidence. It follows that the proofs of participation in the crime against one are proofs against the other of such participation and lack of merits of the defense of alibi.

The crime committed by the appellant is robbery with intimidation of persons as defined in article 293 and punished in article 294 of the Revised Penal Code, and not robbery in an inhabited house as alleged in the information. The penalty for such offense is *prisión correccional* to *prisión mayor* in its medium period. (Article 294, sub-section 5, Revised Penal Code.) The mitigating circumstance of lack of education is not available to the appellant because this circumstance does not apply to crimes of theft or robbery. (United States *vs.* Pascual, 9 Phil., 491.) On the other hand, there have concurred the aggravating circumstances of nocturnity and dwelling, by reason of which the maximum penalty provided by law is to be applied in its maximum period.

The appealed judgment is modified and the appellant is sentenced to an indeterminate penalty of from six (6) months of *arresto mayor* to ten (10) years of *prisión mayor*, with the accessories of law, to pay Cirilo Pamplona ₱814, and to pay one-half of the costs.

Moran, C. J., Feria, Bengzon, and *Briones, JJ.,* concur.

Judgment modified; penalty reduced.

[No. L–659. September 30, 1946]

MARIANO B. ARROYO, plaintiff and appellee, *vs.* HOSPITAL DE SAN PABLO, defendant and appellant

COURTS; COURT OF APPEALS; MOTION FOR NEW TRIAL; CASE AT BAR.—Under the facts stated in the opinion, and without in the meantime setting aside the appealed decision, the lower court was ordered to set this case for hearing as soon as

practicable in order that defendant and appellant may present the transcript of the testimony in civil case No. 9031 of the Court of First Instance of Iloilo, entitled Dolores Vasquez Arroyo *vs.* Mariano B. Arroyo, or so much thereof as is pertinent to this case, with the right of plaintiff and appellee to present such rebuttal evidence as is pertinent, and as soon as possible to transmit said evidence to this court, at the same time suspending the period for filing appellant's brief.

APPEAL from a judgment of the Court of First Instance of Iloilo. Davila, J.

The facts are stated in the opinion of the court.

W. E. Greenbaum and *Luis G. Hofileña* for appellant.
Cirilo Mapa, Jr. for appellee.

RESOLUTION

PERFECTO, *J.:*

On August 19, 1946, defendant and appellant filed a motion for new trial for the purpose of presenting the entire transcript of the testimony in the case of Dolores Vasquez Arroyo *vs.* Mariano B. Arroyo, No. 9031 of the Court of First Instance of Iloilo, or so much thereof as is pertinent, alleging that it is a newly discovered evidence on the existence of which appellant was not aware prior to the trial in the lower court, and that said evidence contradicts plaintiff and appellee's claim for salaries from May, 1911, to May, 1945, in the amount of ₱241,600, and which is of such a character as probably will change the result. Plaintiff and appellee opposed the motion.

Section 2 of Rule 55 indicates the procedure that may be followed in disposing of the motion.

"SEC. 2. *Hearing and order.*—The motion, with the evidence, shall be heard with the record on appeal. The Court of Appeals shall consider the new evidence together with that adduced on the trial below, and may grant or refuse a new trial, or may make such order, with notice to both parties, as to taking further testimony, either orally in court, or by depositions, or render such other judgment as ought, in view of the whole case, to be rendered, upon such terms as it may deem just."

Upon deliberation on the allegations and arguments of both parties, and on the nature of the new evidence that defendant and appellant proposes to present, the court arrived at the conclusion that, to better serve the interest of justice without any unnecessary delay, the defendant and appellant be granted the opportunity to present said evidence, so the same may be taken into consideration when this appeal is submitted for our decision, without the necessity of setting aside in the meantime the appealed decision.

It is resolved to order the lower court to set this case for hearing as soon as practicable in order that defendant

and appellant may present the transcript of the testimony in civil case No. 9031 of the Court of First Instance of Iloilo, entitled Dolores Vasquez Arroyo *vs.* Mariano B. Arroyo, or so much thereof as is pertinent to this case, with the right of plaintiff and appellee to present such rebuttal evidence as is pertinent, and as soon as possible to transmit said evidence to this court. The time within which appellant must submit his brief is suspended pending receipt by this court of said evidence.

Moran, C. J., Feria, Pablo, Hilado, Bengzon, Briones, Padilla, and *Tuason, JJ.*, concur.

PARÁS, *J.:*

I vote to consider the motion for a new trial when the case is decided on the merits.

Case remanded with instructions.

[No. L-699. Septiembre 30, 1946]

ESPERANZA AGUILAR VDA. DE CASTILLO y CONCHA C. APACIBLE, recurrentes, *contra* IÑIGO S. DAZA, Juez del Juzgado de Primera Instancia de Batangas, y MARÍA CASTILLO, recurridos.

1. APELACIÓN; ALBACEAS Y ADMINISTRADORES; ORDEN, CUÁNDO ES APELABLE; CASO DE AUTOS.—La orden de enero 9, 1946, dispone que la ex-administradora judicial C. C. A. entregue a la actual administradora M. C. la pensión alimenticia de los menores F, E, E, y E, que asciende a la cantidad total de ₱5,800 dentro del término de diez días después de notificada de la orden, y, en caso contrario, su fianza y sus bienes muebles serán ejecutados. *Se declara:* Que esta orden es final y apelable: constituye un pronunciamiento definitivo en cuanto a su fianza y bienes muebles; puede ser privada ella de tales bienes, sin necesidad de otra orden judicial.
2. ID.; ID.; ID.—La orden del 17 de enero, 1946, autoriza a la administradora M. C. a contraer una deuda que no exceda de ₱10,000 poniendo en garantía una porción del terreno que está bajo su administración. *Se declara:* Que esta orden es apelable; es final, definitiva y afecta los derechos esenciales de las partes apelantes; puede eternizar la administración de los bienes intestados en perjuicio de los herederos.
3. PRÁCTICA FORENSE; "CERTIORARI Y MANDAMUS"; ESENCIA DE LA ACCIÓN; CASO DE AUTOS.—La solicitud se titula *certiorari* pero lo que desean las recurrentes es una orden perentoria de *mandamus*. En repetidas ocasiones este Tribunal tuvo en cuenta no la forma o el título de la acción sino su esencia.

JUICIO ORIGINAL en el Tribunal Supremo. *Certiorari* y *Mandamus*.

Los hechos aparecen relacionados en la decisión del tribunal.

D. Fidel J. Silva en representación de las recurrentes.
D. Castor P. Cruz en representación de los recurridos.

PABLO, *M.*:

En una petición original de *certiorari* y *prohibition* de 16 páginas presentada por Esperanza Aguilar Vda. del finado Vicente H. Castillo y Concha C. Apacible, ex-administradora del intestado del mismo, expediente No. 366 del Juzgado de Primera Instancia de Batangas, piden las recurrentes que este Tribunal expida (1) una orden al recurrido Hon. Juez Daza para que apruebe y dé curso al expediente de apelación presentado por ellas apelando contra las órdenes de fecha diciembre 27, 1945, y enero 9 y 17, 1946, y (2) otra orden para que dicho Juez desista de continuar actuando en el abintestato del finado Vicente H. Castillo.

Los recurridos, en su contestación, no interponen defensa en cuanto a la orden de diciembre 27, 1945; alegan que la orden de enero 9, 1946, no es apelable; que la orden de enero 17, 1946, es interlocutoria e inapelable y que el Hon. Juez la dictó en el ejercicio de su sana discreción.

La orden de enero 9, 1946, dispone que la ex-administradora judicial Concha C. Apacible entregue a la actual administradora María Castillo la pensión alimenticia de los menores Federico, Ester, Elvira y Eduardo, que asciende a la cantidad total de ₱5,800 dentro del término de diez días después de notificada de la orden, y, en caso contrario, su fianza y sus bienes muebles serán ejecutados. Esta orden es, sin duda alguna, final, y, por tanto, apelable: constituye un pronunciamiento definitivo en cuanto a su fianza y bienes muebles; puede ser privada ella de tales bienes, sin necesidad de otra orden judicial (49 Jur. Fil., 173).

"Any order, judgment, or decree of the probate court capable of being enforced, or taking effect without further order, may be appealed from;" (3 Woerner, The American Law of Administration, 1860, Go Ho *contra* Abeto, 40 Gac. Of., 2818).

La orden del 17 de enero, 1946, autoriza a la administradora María Castillo a contraer una deuda que no exceda de ₱10,000 poniendo en garantía una porción del terreno que está bajo su administración. Esta orden es también apelable; es final, definitiva y afecta los derechos esenciales de las partes apelantes: puede eternizar la administración de los bienes intestados en perjuicio de los herederos.

Los artículos 2 y 7 de la Regla 90 disponen cómo puede un administrador vender o hipotecar los bienes, bajo administración. En la orden contra la cual se desea apelar no consta si la viuda del finado Castillo y otros herederos han sido debidamente notificados de la vista de la moción; si la hipoteca se hace en beneficio o en perjuicio de los herederos. La hipoteca, si garantiza el pago de una can-

tidad considerable, puede obstaculizar la pronta liquidación y distribución de los bienes del intestado. Una hipoteca por tiempo indefinido, otorgada por un administrador mal aconsejado, puede poner en bancarrota el intestado en perjuicio de los herederos, especialmente cuando el juez no permite la apelación bajo la creencia de que la orden es interlocutoria.

El artículo 1, párrafo (*e*), Regla 105 dispone que una persona interesada puede apelar de la orden, en actuaciones sobre liquidación de bienes de difuntos, que constituyere una determinación definitiva y final en el Juzgado *a quo* de los derechos del apelante, y el párrafo (*f*) permite también la apelación si la orden es definitiva y afectare los derechos esenciales del apelante.

La apelación es parte esencial de nuestro sistema de procedimiento, cuya interposición los Juzgados no deben obstaculizar sino más bien facilitar para que no se convierta en derecho ilusorio e inútil.

Ordenar al Hon. Juez recurrido que desista de continuar actuando en el intestado del finado Vicente H. Castillo, es paralizar innecesariamente el despacho del expediente. No hay duda que la intención de las recurrentes es impedir solamente que el Juez haga efectivas sus dos órdenes discutidas.

La solicitud se titula *certiorari* pero lo que desean las recurrentes es una orden perentoria de *mandamus*. En repetidas ocasiones este Tribunal tuvo en cuenta no la forma o el título de la acción sino su esencia. (Galao *contra* Díaz, R. G. No. L–30, 41 Gac. Of., 873; 10 Lawyers' Journal, 37).

Se ordena al Hon. Juez recurrido que pruebe y eleve a este Tribunal el expediente de apelación desaprobado por él en mayo 23, 1946, y que se abstenga, pendiente la apelación, de ejecutar sus órdenes de enero 9 y 17, 1946. Las costas pagarán los recurridos.

Moran, Pres., Parás, Feria, Perfecto, Hilado, Bengzon, Briones, Padilla, y *Tuason, MM.*, están conformes.

Se revoca la sentencia; se devuelve el asunto con instrucciones.

[No. 49252. November 13, 1946]

FERNANDO GUEVARRA and MARCOS GUEVARRA, petitioners, *vs.* VICENTE DEL ROSARIO, Judge of First Instance of Tayabas, HERMOGENES CALUAG, PASTOR C. JAVIER, CARLOS A. BUENDIA, and SEBASTIAN A. LIWAG, respondents.

1. CRIMINAL PROCEDURE; RIGHT TO FILE COMPLAINT, NATURE OF; COMPLAINT, ABATEMENT OF, UPON DEATH OF COMPLAINANT.—The right to file a complaint charging the commission of a crime

is personal. It is so, because as required in section 2, Rule 106, a complaint charging a person with an offense must be subscribed by the offended party. The right being personal, the complaint filed by the complainants abated upon their death.

2. MANDAMUS; PARTIES; SUBSTITUTION BY HEIRS OR LEGAL REPRESENTATIVES WHEN CAUSE OF ACTION IS PERSONAL.—A proceeding in mandamus cannot be prosecuted or continued by the heirs or legal representatives of the petitioners upon the latter's death where the cause of action upon which it is predicated (failure of the respondent court to conduct a preliminary investigation upon a complaint filed by the petitioners charging certain officers with a crime) is personal and did not survive to said heirs and legal representatives.

ORIGINAL ACTION in the Supreme Court. Mandamus.

The facts are stated in the opinion of the court.

Alidio, Lainez & Elegir for petitioners.
Solicitor Vicente Arguelles for respondent Judge.

PADILLA, *J.:*

Fernando Guevarra and Marcos Guevarra pray for a writ of mandamus to compel the respondent court to conduct a preliminary investigation upon a complaint filed by them on June 28, 1944, charging Hermogenes Caluag, Provincial Fiscal of Tayabas, Pastor C. Javier, Municipal Mayor of Candelaria, Tayabas, Carlos A. Buendia, Justice of the Peace of Sariaya and Candelaria, Tayabas, and Sebastian A. Liwag, Clerk of Court of the Justice of the Peace of Candelaria, Tayabas, with the crime of falsification of public documents, defined and punished under article 171 of the Revised Penal Code. They also pray that the respondent court be compelled to communicate on the subject matter of the complaint with the Secretary of Justice so that the latter may appoint an acting fiscal in view of the incumbent's disqualification to act in the case.

Two days after the filing of the complaint referred to, the respondent court acting thereon ordered the return of the complaint to the petitioners, for the reason that the Ministry of Justice or the Bureau of Public Prosecution of the Republic of the Philippines should first be heard before the complaint might be entertained. A motion for reconsideration of the order was denied on July 14, 1944.

The Director of Prisons reports in CA–G. R. No. 77 that the petitioners died in Bilibid Prisons. Emilio Guevarra and Ciriaco Guevarra, sons and brothers of the petitioners, pray to be allowed to substitute the petitioners in this case.

The substitution prayed for calls for the determination of the question whether, upon the death of the petitioners, the action brought in this proceeding survived to their heirs or legal representatives. The action survived if the cause of action survived. The cause of action, upon which

this proceeding in mandamus is predicated, arose from the failure of the respondent court to conduct a preliminary investigation upon a complaint filed by the petitioners charging certain officers with the crime of falsification of public documents. The right of the petitioners to file a complaint charging the commission of a crime is personal. It is so, because as required in section 2, Rule 106, a complaint charging a person with an offense must be subscribed by the offended party. The right being personal, the complaint filed by the petitioners with the respondent court abated upon their death.

Likewise, the cause of action, upon which this proceeding in mandamus is based, is personal. The failure of the respondent court to conduct a preliminary investigation which gave rise to this proceeding was upon petitioners' complaint. The heirs or legal representatives of the late petitioners could not justly complain of the failure of the respondent court to conduct a preliminary investigation, because they had filed no complaint. It was the complaint of the deceased petitioners. The cause of action in this proceeding did not survive to the heirs or legal reprensentatives of the late petitioners, because the complaint filed by the petitioners with the respondent court, from which the cause of action in this proceeding arose, abated upon the death of said petitioners. Hence this proceeding cannot be prosecuted or continued by the heirs or legal representatives of the late petitioners, for the cause of action upon which it is predicated is personal and did not survive to said heirs and legal representatives.

Motion for substitution is denied and petition for a writ of mandamus abated, without costs.

Hilado, Bengzon, Briones, and *Tuason, JJ.*, concur.

FERIA, *J.*, with whom concur MORAN *C. J.*, and PABLO, *J.*, concurring:

I concur in the majority decision for the following reasons:

It is true and plain that the abatement of actions, either by operation of the law or the will of the parties, does not carry with it the extinction of the right of action; but it is also true that the extinction of a cause or right of action necessarily and impliedly carries with it the abatement of the pending action to enforce it, because the latter is but the legal means of enforcing the former.

The common law rule that the death of a party abates a pending action irrespective of whether or not the cause of action survives, has never been in force or applied in this jurisdiction. Section 119 of the old Code of Civil Procedure Act No. 190, from which section 17, Rule 3, of

the Rules of Court was taken, provided that "In case a party to an action dies while the action is pending, the action shall not abate by reason thereof, but the court on motion may allow the action or proceeding to be continued by or against his executor, administrator or other legal representative, etc."

Where the cause of action is entirely personal to the plaintiff and does not survive to his representatives, such as the right to support, divorce, and so forth, the action abates on the death of the plaintiff. But if the right of action is not personal and survives to the representatives of the deceased, the action is not abated or extinguished by the death of the plaintiff, and the latter will be substituted by his legal representative under section 17, Rule 3 of the Rules of Court.

According to our Rules of Court, mandamus is a special civil action, and therefore the provisions of section 17, Rule 3, on substitution of parties who die during the pendency of a suit apply. Rules 1 to 3 of the Rules of Court contain general provisions applicable to all civil actions, ordinary and special, as contradistinguished from a special proceeding; and section 1, Rule 65 of the same Rules further prescribes that "the provisions of the preceding rules [including said Rule 3] shall apply in actions * * * for mandamus, etc." This is in accordance with the rule prevailing in United States, where "it is now considered in most jurisdictions, and especially in those where both legal and equitable remedies are administered by the same tribunal or where the code system of procedure obtains, that a mandamus proceeding is not a special proceeding, but that it is nothing more nor less than an action at law, or a civil action under the code." (18 R. C. L., 333.)

The doctrine enunciated in 18 R. C. L., 335, section 287, as laid down in the case of People *vs.* Western Life Indemnity Co. et al., 261 Ill., 513, to the effect that "A proceeding in mandamus is in the nature of personal action, and it generally abates on the death of the person in whose behalf they have been instituted, is not borne out by the decision in that case. It is true that the Supreme Court of Illinois held in said case that mandamus is a personal action, and the language used was broad enough to warrant the conclusion that the court takes the position that all mandamus proceedings abate on the death of the petitioner; but the subject matter of the action in said case was such that the personal representative who sought to be substituted as petitioner had no interest in its continued prosecution. Said conclusion can not, therefore, be considered as a general rule, but applicable only to cases involving the same or similar facts. In the same decision, it is said that "This Court has stated that where a right

of action is so entirely personal that a person, by contract, can not place it beyond his control, the action will not survive; that, as a general rule, assignability and survivality of causes of action are convertible terms. (Selden *vs.* Illinois Trust and Savings Bank, 239 Ill., 67, 87, N. E., 860) * * *. It appears from the record that the wife is the beneficiary under this insurance policy. It is conceded that she is the only one that could recover under it and that the representative of the deceased, after his death, would not have any interest in said policy, hence the action could not survive to the 'heir, devisee, executor or administrator' under section 10 of the Abatement Act."

In view of the foregoing, we are of the opinion and so hold that the rule is, not that a mandamus proceeding as a personal action abates upon the death of the relator in the absence of statutory provisions to the contrary, but that it may abate or not depending upon the nature of the right sought to be enforced thereby. In other words, the nature of the right of action sought to be enforced by mandamus is a material factor in determining whether or not it abates upon the death of the petitioner. If the right of action involved is entirely personal and, consequently, does not survive upon the death of the party to his representative, the action of mandamus to enforce it abates upon the death of the relator. But if the right sought to be enforced is not personal as, for instance, an action of mandamus to compel a judge to act in an action for recovery of a real or personal property, or a register of deed to inscribe a real estate in the relator's name, the mandamus proceeding does not abate upon the latter's death.

The question to be determined by this Court in the present case is, therefore, whether or not the right of the petitioners, as offended party, to subscribe and file a complaint of falsification of public documents against certain public officers, and compel by mandamus the respondent judge or his successor in the office to practice the corresponding preliminary investigation, is entirely personal and does not survive upon the death of the said petitioners to their representative. If it is not personal and survives or is not extinguished by the death of the petitioners, the now pending mandamus proceeding is not abated, and may be continued by their representative in substitution for the deceased. But if it is entirely personal to the petitioners, or the latter could not, by contract or otherwise, place it beyond their control, it is extinguished by the death of the relators, and the latters' action of mandamus abates and can not be continued by their legal representative under section 17, Rule 3, above mentioned.

Under the Rules of Court relating to criminal procedure, all criminal actions shall be prosecuted under the direction and control of the fiscal, because the people represented by the government is the party in interest to prosecute offenses or crimes and secure the conviction of the offenses in order to preserve the public order. But where a crime or offense not only disturbs the public order but also injures the property right of an individual, the latter, as offended party, is authorized by law to subscribe and file a complaint and prosecute the criminal action, although subject to the direction and control of the fiscal. (Sec. 4, Rule 106, Rules of Court.) The Rules of Court do not directly define the meaning of "offended party," but from the provision of section 11, Rule 106, of the said Rules, it may clearly be inferred that offended party is the person against whom or against whose property the crime was committed.

Under the American system, the prosecution of public offenses is reserved to the representative of the government and the individual citizen can not bring an action for that purpose, for he is protected by his right to bring a civil action for damage caused by the crime. The old G. O. No. 58, from which the Rules of Court on criminal procedure were taken, has compromised only with the private penal action of the injured party, but with that of the latter alone,—not with the action which under the former law on the subject of criminal procedure might be brought by any citizen who might desire to aid the action of the Government. (United States *vs.* Malabon, 1 Phil., 731, 733.) But, while one of the reasons in maintaining the private penal action of the injured party himself, was the right of the latter to the civil obligation of the defendant resulting from a crime or misdemeanor, the right granted by law to the injured party to subscribe and file a complaint against the offender, is not made to depend upon his right of action to recover from the offender the latter's civil liability arising out of the crime or offense in each particular case. Because, although no civil action may arise out of an offense, the injured party may subscribe and file a complaint, as in bigamy and other offenses in which the injury or damage caused to the victim can not be compensated in terms of money. And even though a public offense causes damage or injury to and recoverable by the aggrieved party, and the latter waives or reserves the right to institute separately the civil action under section 1 of Rule 107, the injured party is entitled or preserves his right to subscribe and file a complaint against the accused, because of his being the offended party.

This right conferred by law upon the offended party is purely or entirely statutory and personal, and upon his death it does not survive to his representative. The heirs

of the deceased can not exercise the same right or continue the proceeding instituted by the decedent, although they may, as any other person, inform the prosecuting attorney of the commision of the crime or offense, because they are not and can not be considered the offended party. As above stated, the right granted by the Spanish Code of Criminal Procedure to any citizen who might desire to aid the action of the Government, to bring a penal action, was abolished by the rules of criminal procedure contained in G. O. No. 58 and its amendments.

PERFECTO, *J.*, with whom concurs, PARÁS, *J.*, dissenting:

On June 28, 1944, petitioners commenced a criminal action by filing directly with the Court of First Instance of Tayabas a complaint charging several officials with the offense of falsification of public documents which was docketed as criminal case No. 158 of said court.

Petitioners allege that Judge Vicente del Rosario of the Court of First Instance of Tayabas issued on June 30, 1944, an order commanding the clerk of said court to return the complaint to petitioners with instructions either to file the case with the Ministry of Justice or the Bureau of Public Prosecution which should first be heard before the suit is entertained by the court or to file said criminal complaint with the justice of the peace court. On July 3, 1944, petitioners filed a motion for reconsideration, which was denied by the respondent judge on July 14, 1944, ruling that only an information signed by the fiscal and not a complaint signed by the offended party may be filed with the Court of First Instance directly.

Alleging that the lower court has violated the provisions of section 4 of Rule 108, section 4 of Rule 106, and section 1 of Rule 124, petitioners pray that judgment be rendered commanding the lower court to conduct a preliminary investigation in said criminal case No. 158.

The rule provisions invoked by petitioners are as follows:

"Upon complaint or information filed directly with the Court of First Instance, the judge thereof shall conduct a preliminary investigation in the manner provided in the following sections, and should he find a reasonable ground to believe that the defendant has committed the offense charged, he shall issue a warrant for his arrest and try the case on the merits." (Sec. 4, Rule 108.)

"All criminal actions either commenced by complaint or by information shall be prosecuted under the direction and control of the fiscal." (Sec. 4, Rule 106.)

"Courts of justice shall be always open, except on legal holidays, for the filing of any pleading or other proper papers, for the trial of cases, and for the issuance of orders or rendition of judgments. Justice shall be impartially administered without unnecessarily delay." (Sec. 1, Rule 124.)

On August 23, 1944, Solicitor General Sixto de la Costa and Solicitor Vicente Arguelles filed the following answer to the petition:

"Come now the undersigned counsel for the respondent Judge of the Court of First Instance of Tayabas, and respectfully state:

"That under the Rules of Court a criminal complaint may be filed directly with the Court of First Instance by the offended party and that upon the complaint filed, it is the mandatory duty of the Judge thereof to conduct a preliminary investigation in the manner provided by said rules. (Rule 108, Section 4 of the Rules of Court.)

"That it is a uniform practice that when a complaint is laid before a magistrate be he a judge of the Court of First Instance or a Justice of the Peace, 'he must make a preliminary investigation, and if he is satisfied that the crime complained of has been committed and that there is reasonable ground to believe that the party charged has committed it, he must take the action the law requires' (United States *vs.* Banzuela and Banzuela, 31 Phil., 564; People *vs.* Solon, 47 Phil., 443, 453).

"That it is error on the part of the respondent Judge to order the return of the complaint filed in the case in question to the aggrieved party for reasons stated in the pronouncements made in the orders of the court of June 19, 1944 and July 14, 1944; and that said complaint could have been entertained in court without prejudice to endorsing the matter to the Bureau of Public Prosecution for such action as said office may deem proper.

"Wherefore, it is submitted that the orders of the Court of First Instance of June 30, 1944, and July 14, 1944, subject of the present proceedings are not in accord with law, and that the petitioners are entitled to the remedy sought in these proceedings."

Emilio Guevarra and Ciriaco Guevarra, sons of petitioner Fernando Guevarra and brothers of Marcos Guevarra, being co-accused in the criminal case for murder wherein the alleged falsification of public documents has been committed, filed in this Court a motion to prosecute this case in substitution of petitioners Fernando and Marcos Guevarra who, according to the Director of Prisons, died while detained in the Bilibid Prison, in Muntinlupa.

The majority voted to deny the motion for substitution and to dismiss the petition, the latter notwithstanding the fact that the Solicitor General himself, more than two years ago, had filed an answer agreeing with the petition because "the petitioners are entitled to the remedy sought in these proceedings."

The majority contend that the right of petitioners to file a complaint charging the commission of a crime is personal and abated upon their death; and that the cause of action, upon which this proceeding for mandamus is based, is also personal and, for that reason, did not survive to the heirs or legal representatives of said petitioners, because upon their death the complaint filed by them with the respondent court abated.

The whole architectural structure of the majority's theory is built, not upon the rocky foundation of any legal principle—either universally accepted or just newly discovered by a pioneering juridical or philosophical genius, not even upon any plausible legal maxim invented by a resourceful Lord Coke in support of a just or equitable solution of a controversy—but upon the haziness and broad meaning of an adjective: "personal."

The majority's syllogism starts from the following major premise: *All things personal abate and do not survive with the subject's death, and are intransmissible.*

The thesis can not stand the least analysis. Everybody knows that almost all, if not all, things transmitted by the death of a person to his heirs are, or may be, designated as "personal." There are, in the first place, things which are classified as strictly personal goods, such as, furniture, money, shares, and other movable property. Even lands and buildings are "personal" property, as distinguished from conjugal or communal property. The paraphernal estate of a deceased wife is her "personal" property.

The consequences to which the majority's thesis leads are too obvious and too obviously senseless that we feel it needless to expose further its absolute lack of any foundation on reason or common sense, on logic or experience.

Now, if the majority, by adopting a novel and arbitrary lexicon, should want the adjective limited to a kind of personal things which, by their very nature, die with the subject's death, then the major premise of their syllogism must be restated to convey that sense.

But then such kind of personal things shall exclusively and absolutely comprise alone the organs and other parts of the physical body which dies at his death. Of course, they will not include his spirit, his thoughts, or the written words in which he had expressed them. Those thoughts, if of permanent value, such as those that sprang from the minds of great men, like Rizal or Mabini, or from the minds of great thinkers, never die and are transmitted to coming generations for mankind to cherish until the end of time.

Even the destructible parts of the physical body of a dead person, notwithstanding their superlative personal character, remain transmissible. The devilish leaders of Nazi Germany took full advantange of this fact at Maidanek where the remains of millions of men, women and children they massacred were used to fertilize their orchards and gardens.

The right of filing a complaint for the commission of a crime and the right to enforce that right by mandamus can not, surely, be identified with any physical limb or organ of the subject of those rights.

If by designating them as "personal" the majority wanted to convey the idea that they are exclusively personal, from which they concluded that they are intransmissible, they must feel that their theory is completely indefensible, when they had to seek refuge under an sphynxian silence, supplying the lack of ground and truth of their theory with the emphasis of an unreasoned assertion, made with the dogmatism of absolutists who would not countenance any discussion of, and would frown with olympic disdain at, the challenge of an argument. *"Magister dixit ita est."*

Section 2 of Rule 106 is invoked by the majority to support the proposition that the right to file a complaint for the commission of a crime is personal and is used as a board from which to jump to the conclusion that it is also intransmissible.

They assume that because said section defines the complaint as "a sworn written statement charging a person with an offense, subscribed by the offended party, any peace officer or other employee of the government," no other party can sign or file it.

Evidently, the majority have lost sight of the provisions of section 5 of Rule 106, regarding sufficiency of criminal complaint or information, which reads as follows:

"SEC. 5. *Sufficiency of complaint or information.*—A complaint or information is sufficient if it states the name of the defendant; the designation of the offense by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate time of the commission of the offense, and the place wherein the offense was committed.

"When the offense is committed by more than one person, all of them shall be included in the complaint or information."

It can be seen that, while section 2 of Rule 106 defines complaint as a "sworn written statement charging a person with an offense, subscribed by the offended party, any peace officer or other employee of the government or governmental institution in charge of the enforcement or execution of the law violated," section 5 thereof specifies the essential elements which would make a complaint sufficient. Among said elements, the signature "by the offended party, any officer or other employee of the government" is not mentioned. In other words, under section 5 of Rule 106, a complaint is sufficient although it does not bear the signature of the "offended party, any peace officer or other employee of the government." Said section admits even the possibility of a complaint not bearing the signature, not only of the persons mentioned in section 2, but also of any other person.

It must be so under the philosophy underlying our system of criminal law which, as it happens in all enlightened countries, starts from the principle that all criminal offenses

undermines the social stability and orderliness of society and that the real offended party, aside from the actual victims themselves, is the people. An unmistakable statement of that philosophy underlying our system of criminal law appears in section 1 of Rule 106, which provides:

"SEC. 1. *Commencement of criminal action.*—All criminal actions must be commenced either by complaint or information in the name of the People of the Philippines against all persons who appear to be responsible therefor."

The error of the majority in insisting, in the present case, that the complaint for falsification of public documents in question did not survive upon the death of complainants Fernando and Marcos Guevarra, and in denying their surviving sons and brothers, Emilio and Ciriaco Guevarra, the right to continue these mandamus proceedings and to prosecute the complaint filed by the two deceased, starts from the primitive concept that the crime had offended exclusively the victims and that the victims are the only ones entitled to prosecute the culprits. All cultured persons ought to know that such an underlying concept is outworn and has been discarded, and is outgrown by a more advanced system of philosophy in criminal law. The fact, established by sociological studies and researches, that the tribes of remote antiquity would make reprisals and would even start tribal wars for offense committed against one of their members, is a conclusive proof that the primitive concept which we are refuting could have only been accepted before the existence of any organized human community.

In the present case, the sons and brothers of the deceased complainants, Emilio and Cirilo Guevarra, are, after all, as offended parties themselves as the deceased for two reasons:

1. Because, as sons and brothers of the victims of the alleged falsifications, they suffered almost as much as the deceased from the effects of the falsifications, as it is only natural to persons so closely related.

2. Because they themselves were later included as accused in the criminal proceedings in which the alleged falsifications were committed, as alleged co-authors of the murder imputed to the deceased, and the harm inflicted upon them by said proceedings appears self-evident, considering the fact that we had only recently, by unanimous decision, acquitted them of the crime charged in the information. (CA–G. R. No. 77, People *vs.* Fernando Guevarra et al.)

We vote for the granting of the motion for substitution and of the prayer of the petition, concurred in by the Solicitor General himself in representation of the respondent Court of First Instance of Tayabas. The fact that the

rules have been violated by the lower court more than two years ago and the relief sought in the petition, notwithstanding the Solicitor General's answer, has not been acted upon for that long period of time, instead of lessening petitioner's right to seek the relief prayed for makes stronger the plea for said relief. The law must be complied with. No excuses, no compromises, no circumventions should be allowed to defeat the unmistakable mandates of the law. Much less when in the complaint for falsification of public documents, which was illegally rejected by the lower court, the high interests of public morals and society are at stake. The fact that the crime was allegedly perpetrated by government officials, entrusted with the duty to keep watch over the law and to prosecute all kinds of lawlessness, makes more imperative that the petition should not be so lightly whitewashed.

The stern attitude of the law against all erring persons must not be relaxed because the alleged culprits are law officers. No violation of the law must be countenanced only because it will protect the erring officials or because the law is invoked by the weak, the defenseless, by one who is under indictment for an abhorrent crime, or by a moral leper, spurned by all his fellow citizens. The law is incompatible with the iniquities of discrimination.

Motion for substitution denied; petition for writ of mandamus abated.

DECISIONS OF THE COURT OF APPEALS

[No. 104. Marzo 8, 1947]

EL PUEBLO DE FILIPINAS, querellante y apelado, *contra* RUPERTO PINEDA, ET AL., acusados y apelantes

1. DERECHO PENAL; PRUEBAS; DECLARACIÓN "ANTE MORTEM," SUJETA A TODA IMPUGNACIÓN.—Una declaración *ante mortem* está sujeta a toda impugnación fundada en circunstancias del lugar, tiempo y ocasión que la hacen improbable.
2. ID.; DEFENSA PROPIA; NECESIDAD RACIONAL DEL MEDIO PARA REPELER LA AGRESIÓN; FACTORES QUE DETERMINAN SU RACIONALIDAD.—La necesidad racional del medio para repeler una agresión no implica una comensurabilidad material en los medios de ataque y defensa. Lo que exige la ley es una equivalencia racional, en cuya consideración entran como principales factores la emergencia, el peligro inminente a que se expone el agredido, el instinto, como o más que, la razón que mueven e impelen a la defensa (Pueblo *contra* Lara, 48 Jur. Fil., 162, la proporcionalidad de la cual "* * * does not depend upon the harm done, but rests upon the imminent danger of such injury." (E. U. *contra* Paras, 9 Jur. Fil., 376; Revised Penal Code, Albert 67.)

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Tárlac. Summers, J.

Los hechos aparecen relacionados en la decisión del Tribunal.

D. Union C. Kayanan en representación de los apelantes.
El Procurador General Auxiliar Sr. Alvendia y *el Procurador Sr. Feria* en representación del apelado.

DE LA ROSA, *M.:*

Hacia las 4 de la tarde del 29 de junio de 1945 Gelacio Cortés murió a consecuencia de las heridas que con un bolo le había inferido Ruperto Pineda, en la casa de éste, ubicada en el sitio de Alambre, barrio Lawang Cupang, del municipio de La Paz, de la Provincia de Tárlac. Esta es la tragedia por la cual los esposos Ruperto Pineda y Cesárea Galas afrontan este proceso criminal, en el que se ha pronunciado contra ellos veredicto de culpabilidad por el Juzgado que lo tramitó en primera instancia, condenándoles a sufrir 17 años, 4 meses y 1 día de reclusión temporal, con las accesorias de la ley, a indemnizar a la familia del occiso en la cantidad de ₱2,000 y a pagar las costas, fallo contra el cual se alzaron, para su revisión.

El suceso ocurrió a las 3 pasadas de la tarde del referido día 29 de junio de 1945 y no hubo testigos presenciales, espectadores extraños, en su desarrollo y culminación.

Las pruebas de acriminación consisten en alegadas declaraciones *ante mortem* y confesiones de los mismos acusados, a saber:

Felipe Tuazon relató que, a las 4 de la tarde del día de autos, volviendo a su casa, situada en el expresado sitio de Alambre, se encontró en el camino con Ruperto Pineda, seguido a unos 150 metros de distancia por su esposa Cesárea Galas, que corrían hacia el barrio de Lawang Cupang, e informado por aquél de que había dado de bolazos a Gelacio Cortés, se dirigió al lugar del suceso y allí,

"R. Immediately when I went up, Gelacio Cortes told me: I did not commit any sin, yet they boloed me." (N. t., p. 18);

Alfredo David, teniente auxiliar del repetido barrio de Lawang Cupang, testificó que Felipe Tuazon, en esa tarde del 29 de junio de 1945, le avisó que Ruperto Pineda atacó e hirió, en su casa, con un bolo a Gelasio Cortés y, acudiendo al lugar, hallóle aún con vida y fuerzas para sostener esta conversación:

"R. I asked him why that happened to him, and he replied: I am dying now, but I am not at fault."

"R. I asked him, 'why did you come here?'

"R. He answered 'I sought shelter in his house because it was raining.'

"R. I asked him whom he reached in the house, and he answered the two spouses Ruperto Pineda and Cesarea Galas." (N. t., pág. 23.)

Zoílo Mendoza, teniente del mencionado barrio de Lawang Cupang, avisado por alguien, a su vez, acudió a la casa de los acusados y, en ella, de la boca de Gelacio Cortés, según él, supo:

"R. Yes, sir; at about 3 or 4 o'clock in the afternoon, 29th of June, 1945, I was called in my house and they told me that there was an unusual happening in the house of Pineda. When I arrived in the house of Ruperto Pineda, I saw Alfredo David and I asked him where was Gelasio Cortez and he said that he was in the house. I went up and saw him lying down face upward. And he received those wounds on the body and said that he would die because of these wounds.

"R. His eyes were closed." (N. t., pág. 33.)

"R. I asked him who boloed him and he replied that he was invited by the spouses to go up their houses and when he was inside the house he sat down and then he was boloed by Ruperto Pineda though he was not at fault." (N. t., pág. 34.)

Continuando su testimonio, aseveró que en esa misma tarde Ruperto Pineda se presentó ante él, y

"R. I told him to proceed to town and surrender himself there." (N. t., pág. 35);

Rómulo Bundoc, cuñado del occiso Cortés, declaró que se fué a la casa de Ruperto Pineda en la tarde del suceso en compañía del teniente auxiliar David y, después que éste haya hecho preguntas a Cortés, él también le habló:

"A. First I asked him 'Kuya, why are you here?' and I followed with another question: 'Why has this happened to you?' He answered, 'I came from my seed beds, the rain was coming and I took shelter in this house.' Then I asked him: 'When you took shelter here, whom did you find here?' He answered: 'The husband and wife when I reached near their house, they invited me to go up the house, saying: 'Please come up Pareng (compadre)' and I asked him: 'What happened after you have gone up?' My brother-in-law answered: 'We three were talking together. When we were talking Ruperto Pineda went inside the silid (small room) and when he came out, he had bolo with him and I asked him 'What happened'? He struck me at the nape of my neck (la nuca) and after that he boloed me repeatedly.'"

"A. He was lying sidewise and he apparently could speak very well and I asked him if he recognized us and he answered that he do." (N. t., pág. 94)

"Q. In that conversation you had with your brother-in-law Gelacio Cortes; did he tell you the said phrase 'Please come up, Padre?'

"A. Yes, sir, my brother-in-law told me that Ruperto Pineda was the one who made that invitation." (N. t., pág. 91);

En el affidávit de Ruperto Pineda, Exhíbito F, cuya traducción al inglés es el Exhíbito F–1, se lee:

"Q. What else did you and your wife talk about?

"A. We agreed that the following day the moment Gelacio Cortez came to our house, I will pretend to sleep inside the room of our house and my wife will pretend sewing near the stairway. When Gelacio Cortez passed by, my wife will invite him to come up the house telling him that I am away. Then my wife will let Gelacio Cortez embrace her and while embracing her, my wife will shout and ask for help from me. I then will immediately come out from the room (silid) and will bolo Gelacio Cortez until he die.

"Q. On the following day, June 29, 1945, at about 3 o'clock p.m. what happened in your house?

"A. Gelacio Cortez came.

"Q. What did your wife do?

"A. I pretended sleeping in the room (silid) and my wife pretended sewing near the stairway.

"Q. What did Gelacio Cortez tell to your wife?

"A. He asked my wife if I was in the house.

"Q. What did your wife answer?

"A. She said that I was away and invited him to come up the house.

"Q. When Gelacio Cortez was inside your house what did he do to your wife?

"A. He embraced my wife and grasped her nipples and kissed her.

"Q. What did your wife do when Gelacio Cortez was embracing her?

"A. My wife shouted for help and asked succor from me.

"Q. What did you do when your wife called for you?

"A. I immediately stood up from my lying position, got the bolo and boloed Gelacio Cortez at the neck. When Gelacio Cortez was boloed at the neck, Gelacio Cortez released my wife and he fell. When he fell down I boloed him several times and then left him";

Y en el affidávit, Exhíbito G, de Cesárea Galas, cuya traducción al inglés es el Exhíbito G–1, se dice:

"Q. What did you discuss with your husband in order to kill Gelacio Cortez?

"A. We agreed that the moment Gelacio Cortez comes to our house, I will pretend sewing near the stairway and my husband will pretend to sleep in the room of our house, I will invite Gelacio Cortez to come up the house and when inside I will let him embrace me and when embracing me, I will shout and call my husband and my husband would immediately come out of the room and bolo Gelacio Cortez.

"Q. The following day, June 29, 1945, at what time did Gelacio Cortez arrive at your house?

"A. At 3 o'clock in the afternoon more or less.

"Q. When Gelacio Cortez came what did you and your husband do?

"A. I pretended to be sewing by the stairway and my husband went inside the room pretending to be asleep.

"Q. What did you say to Gelacio Cortez?

"A. I invited him to come up and I told him that my husband is away.

"Q. What did Gelacio Cortez do when you told him that your husband is not there?

"A. He came up the house and embraced me and caught my nipples and my private parts laying me down in order to have sexual intercourse with me.

"Q. What did you do?

"A. I shouted and called for my husband as we have agreed upon.

"Q. What did your husband do?

"A. He stood up, picked up his bolo and boloed Gelacio Cortez at the neck. Upon being boloed at the neck, he fell down, releasing me from his embrace. When Gelacio Cortez fell down, my husband boloed him several times and then he left."

De las declaraciones de los referidos testigos Felipe Tuazon, Alfredo David, Zoilo Mendoza y Rómulo Bundoc se hace consistir la reproducción de las pretendidas manifestaciones que Gelacio Cortés hiciera antes de expirar, para corroborar las cuales fueron presentados los citados affidávits de Ruperto Pineda y Cesárea Galas, Exhíbitos F y G, respectivamente.

Como concausas del alegado complot que tramaran los esposos Pineda para asesinar a Gelacio Cortés, Romúlo Bundoc refiere que en mayo de 1945 Ruperto Pineda se fué a la casa de Gelacio Cortés para pedir en prestámo un caván de palay y, como éste se lo negara, aquél al marcharse dijo: "times are not settled yet, bad people and envious people should be killed" (n. t. pág 96); Pilar

Bundoc, viuda del interfecto Cortés, relaciona (*a*) que unas dos semanas antes del 29 de junio de 1945 la vieja madre de Ruperto Pineda tropezó con el tirante de alambre de su casa—de la testigo—y se cayó, y éste, al acudir donde estaba aquélla, cortó dicho alambre y retó a su marido, con bolo en mano, a una pelea, (*b*) que después de este suceso del alambre Pineda se llevó un perro de ellos—los esposos Cortés—para cazar,

"But the dog was not returned that afternoon nor that night and even the following morning." (N. t., págs. 107–108);

y, (*c*) que en la mañana del día del suceso, 29 de junio de 1945, Ruperto Pineda pidió a Gelacio Cortés algunos *wooden cross-ties* (traviesas), y el último no se los dió y se negó a ir con el primero para recoger leña cerca del riachuelo (n. t. pág. 112); y en el affidávit Exhíbito G, de Cesarea Galas, se dice que en 28 de junio de 1945 Gelacio Cortés comenzó a cortejarla, para hacerla su querida, y la previno que, si se negaba, mataría a ella y su esposo, a quien manifestó al llegar:

"* * * Somebody had been poking me with a stick from under the house when he was away and that it was no other than Gelacio Cortez." (Exhibit G–1.)

Existen pruebas que en la casa de los esposos Pineda, había en el día de autos, un cesto grande que contenía algunos cavanes de palay; que la madre de Ruperto Pineda, de 70 años de edad, vive en el barrio de Amuco, de la jurisdicción del municipio de Tárlac, y no fué en junio sino en enero de 1945 la última vez que para visitar a su hijo estuvo en el sitio de Alambre; que Pineda no se ha servido de ningún perro, si alguno tenía Cortes, para cazar; que el barbero de Cortés era Pineda, y los dos no se habían visto en la mañana del día del suceso; y que Cortés no ha cortejado, menos aún solicitado a Cesarea Galas para que sea su querida.

Sin embargo, admitiendo que mediaban disgustos entre las dos familias, Pineda y Cortés, los motivos eran tan triviales para creer que se llegaría al extremo de fraguar un asesinato. Además, si tales disgustos hubo, parece que se han ido olvidando, pues que, según Pilar Bundoc misma, algunos días después del suceso del alambre, Pineda les pidió prestado un perro de caza que tenían y, en la precisa mañana del suceso, pidió también a su esposo algunas traviesas.

Pero, de una parte, Gelacio Cortés pudo realmente hablar y sostener conversación con dichos testigos Felipe Tuazon, Alfredo David, Zoílo Mendoza y Rómulo Bundoc, y de otra, son genuinas y espontáneas las admisiones

que se atribuyen a Ruperto Pineda y Cesarea Galas en sus affidavits Exhíbitos F y G?

El Dr. D. Martin, presidente de la séptima división sanitaria de la provincia de Tárlac, que a las 5 de la tarde del 29 de junio de 1945 practicó la autopsia del cadáver de Gelacio Cortés, una hora después de la muerte de éste, en su certificado médico Exhíbito A, dice:

"EXTERNAL EXAMINATION:

The body was that of a man, Filipino, appearing to be about 25 years of age, fairly nourished, about 5 ft. and 2 inches in height. There is not yet *post mortem* rigidity. The body is generally pale, the mouth closed, and the eyes slightly open and face expressionless.

"POST-MORTEM" FINDINGS:

"(1) Incised wound—5 inches x 1 inch—along the post part of the right fore-arm.

"(2) Stab-wound—3 inches x 2 inches along the inner part of the right arm.

"(3) Incised-wound—4 inches x 2 inches along the lateral part of the neck left side, directly inwards and downwards; severing the external carotid artery.

"(4) Stab-wound—5 inches x 3 inches along the anterior parts of the left thigh.

"(5) Incised-wound—3 inches x 1 inch at the chin left side.

"(6) Stab-wound—5 inches x 3 inches along the back part of the neck.

CAUSE OF DEATH:

"Profused hemorrhage resulting from the wounds mentioned above, especially the incised wound along the lateral part of the neck, left side, severing the external carotid artery."

Y, el mismo doctor, declarando en la vista, a las preguntas de la defensa, contestó:

"Q. Could it have been possible but the internal carotid has been severed?

"A. It is possible but I did not see.

"Q. How about the jugular vein?

"A. It may be included there. (N. t., pág. 10.)

"Q. What would that severance of the external carotid artery produce on man; can it produce death?

"A. Instant death.

"Q. And what is instant death?

"A. It may be that in five minutes a person receiving the injury of that sort may die, or, it may be one hour after receiving the injury." (N. t., pág. 11.)

En este su testimonio, el Dr. Martín admite la posibilidad (*a*) de que el tajo, que produjo la herida del cuello descrita en su certificado médico Exhíbito A, cortó la arteria carótida interna y la vena yugular y (*b*) de que la muerte de Gelacio Cortés sobrevino cinco minutos después de caer herido. No habiendo visto, en el curso de su autopsia del cadáver, la carótida interna, lo que pasó a esta es conjetural; más, en cuanto a la vena yu-

gular externa, que de fuera cubre y protege la carótida externa, no se concibe que el tajo que cortó esta arteria no cercenó aquella vena. Ambas son vasos principales que, con otros conductos, tejidos y órganos adyacentes, forman estructura rota por una incisión.

En *Legal Medicine and Toxicology,* por Gonzales-Vance and Helpern, se dice que,

"NECK.—* * * Death usually results *from cutting of the carotid arteries or the jugular vein.* The patient bleeds freely, either into the neck tissues, or externally. * * *" (Pág. 203.)

En *Sidney Smith Forensic Medicine,* se lee que,

"Wounds of the neck are likely to be dangerous, owing to the number of important structures situated close together and the relatively slight protective coverings. The main danger is hemorrhage from incision of the *caroted arteries and jugular veins, for if these structures are injured death is certain in the absence of skilled assistance.*" (Pág. 149.)

Y en *Legal Medicine,* por Ángeles, se contiene la observación de que,

"As a rule, *wounds which are instantly mortal prevent motion after receiving the wound.* * * *" (III pág. 317.) (Las cursivas son nuestras.)

Con dicha incisión del cuello, de diagnóstico mortal, y las otras cinco heridas, cuyos respectivos tamaños dicen de su importancia, drenajes que no se han tratado de cerrar, se debe formar idea del estado patológico de Gelacio Cortés en el momento en que según Felipe Tuazon, Alfredo David, Zoilo Mendoza y Rómulo Bundoc le habían hablado y preguntado del porqué se encontraba en aquella situación.

La postración nerviosa (shock), consiguiente a las heridas graves, en Medical Dictionary for Lawyers, se define:

"*Shock.*—A sudden agitation or depression of the physical or mental sensibilities, and of the vital forces of the entire body, which leaves some profound impression on the nervous system, *as by a severe injury* or some overpowering emotion. * * *" (Maloy, pág. 412.) (La subraya es nuestra.)

Las afirmaciones de los expresados testigos Tuazon, David, Mendoza y Bundoc van en graduación ascendente, pues, mientras el primero sólo asegura que Cortés le dijo:

"I did not commit anything, yet they boloed me."

el último, que ha llegado con posterioridad a aquél, refiere el suceso con minuciosidad, como si Cortés, en vez de debilitarse más y más, por la pérdida de la sangre que fluía de sus heridas, haya adquirido fuerzas, física y mental, para darle cuenta detallada de cómo fué herido, haciendo recaer todo el peso de la responsabilidad en los esposos Ruperto Pineda y Cesarea Galas.

En *Annotated Rules of Court,* por Francisco, se acota:

"83. Notwithstanding the great consideration to which the declaration of a person at the point of death is entitled when he is about to appear before the Supreme Judge to render an account of his acts on earth and receive the deserved reward or punishment, without any more interest than that of the salvation of his soul, when there exist circumstances showing that his declaration might have been influenced by the passion of anger and vengeance, said declaration must be taken with great caution, in view *of the natural inclination of man to exonerate himself and justify his conduct* (Underhill on Criminal Evidence, par. 102). (IV, p. 576.)" Las cursivas son nuestras.

Según Alfredo David y Zoilo Mendoza, Gelacio Cortés se cobijó de la lluvia en la casa de los esposos Pineda, a invitación de estos, pero según Rómulo Bundoc, su cuñado le dijo:

"Please come up, padre.
Ruperto Pineda was the one who made that invitation." (N. t., pág. 94.)

Las pruebas de cargo tienden a demostrar que Gelacio Cortés venía de su semillero y volvía a su casa cuando, con motivo de la lluvia que estaba por caer o ya caía, se resguardó en la casa de Ruperto Pineda, lo cual se aduce que favoreció los planes de éste y su esposa para asesinarle.

El Exhíbit 1 es un croquis, aproximadamente exacto de la situación, en el sitio de Alambre, de las casas de Ruperto Pineda y Gelacio Cortés, que forman un triángulo con el semillero del segundo, que está al otro lado de un canal de irrigación, por vértice. Tal como aparece en este croquis, trazada con tinta negra, hay una senda que parte del semillero, bordea el canal de irrigación y lo atraviesa en el vado situado a la vera de la casa de Cortés. Según las pruebas, esta es la vía corta, limpia y vecinal, entre la casa de Cortés y su semillero, y desde éste no existe vado, ni camino al otro lado del canal que se dirija a la casa de Pineda y llegue hasta la de aquél, sino lo que hay son trechos cubiertos de *makahiya* (sensitiva), de agudas púas. Porqué, precisamente en una tarde lluviosa, Cortéz prefirió hacer un recodo largo para volver a su casa, en lugar de seguir el camino recto que ordinariamente tomaba para ir a y venir de sus trabajos? Parece un enigma!

Cesárea Galas hace del suceso esta versión:

"Q. In the afternoon of June 29, were you expecting somebody else to come to your house besides your husband?
"A. None.
"Q. Did somebody come?
"A. Yes, sir, Gelacio Cortes.

"Q. Did your husband know that Gelacio Cortes was coming to your house at that time?

"A. He did not know.

"Q. Did Gelacio Cortes announce in anyway his entrance to your house?

"A. No, sir.

"Q. What did Gelacio Cortes do upon arriving in your house then?

"A. Upon Gelacio's arrival in my house and seeing that I was alone, he embraced me.

"Q. What else?

"A. He was kissing me and trying to lay me down.

"Q. Will you please relate to the court what happened later on.

"A. When he laid me down, I was crying and calling my mother that there was a bad man, and because I was crying, Gelacio Cortes covered my mouth (witness showing to the court by placing her right hand over her mouth) and he was covering me being stronger than I was; then I was kicking at him. While he was over me, I was trying to push him away and kicking at him and that is when my husband came; when my husband came I saw him approached Gelacio and pushed him away and when he pushed at Gelacio I stood up and Gelacio stood up also; then he faced my husband and gave him a blow; when I saw that they were giving blows to each other, I cried calling my mother and I was trembling.

"Q. What else did you say?

"A. While I was crying calling my mother, I saw Gelacio Cortes give blows to my husband; while Gelacio Cortes was giving blows to my husband, my husband pulled out his bolo and while Cortez was giving a blow to my husband, Ruperto boloed Gelacio on the right forearm; while Ruperto Pineda was boloing Gelacio, Gelacio was trying to wrest the bolo and while he was trying to wrest the bolo from my husband and while he was holding my husband's hands, my husband pulled his hands and Gelacio then lost hold of my husband's hands and my husband boloed Gelacio on the left side of the neck. After my husband boloed Gelacio on the lateral part of the left neck, Gelacio Cortes turned then my husband boloed him on the nape of the neck then when Gelacio Cortes turned around my husband again boloed him on the left thigh. After my husband boloed Gelacio on the left thigh, Gelacio Cortes fell whereupon Ruperto put him on his side to see whether he was still alive; then he put his right finger below his nose to test whether Gelacio Cortes was still breathing and when he noticed that Gelacio Cortes was breathless my husband left." (N. t., pág. 194.)

Y, esta versión de Cesárea Galas, su esposo Ruperto Pineda lo corrobora:

"P. What time did you go home on the afternoon of June 29, 1945?

"R. Past three o'clock.

"P. Upon your arrival to your house, did you notice anything unusual in your house?

"R. Yes, sir, there was.

"P. What did you see?

"R. When I was nearing my house I heard somebody crying, calling for her mother; when I heard that, my blood boiled, then I hastened my steps. After I reached our house, I saw Gelacio Cortes on top of my wife (sasacban).

"P. Will you please demonstrate that to the Honorable Court?

ATTY. CAYANAN: The witness demonstrating to the Court the position of Gelacio Cortes when he saw him (witness sat himself on the floor over his knees with his body laying horizontally to the floor, with both hands a little above the head and with his knees resting on the floor, his buttock slightly protruding upwards and his two feet not extended, the left leg being a little forward than the right).

"P. Will you please tell the Court what ensued later on?

"R. When I saw Gelacio Cortes in that position, over my wife, I grabbed him by the waist and pushed him aside, then he stood up and struck me a blow on my left arm, below the shoulder. After he has struck me that blow, he launched at me and we grappled, and we reached the middle of the house, then I pulled my bolo from its scabbard and I struck him a blow on the right forearm as he was trying to strike me with his fist.

"P. Continue and at the same time, demonstrate what happened later on.

"R. After I struck him, because Gelacio Cortes was stronger, he being stouter than I, I struck him again on the inner part of the right arm (witness shows the action by waving both his hands on the air with closed fists) after I had struck Gelacio Cortes on the inner portion of his right arm, he tried to grasp my hand which was holding the bolo, with his left hand, but I succeeded in disengaging my hand from his grasp; then, I was able to strike him a blow on the left side of the neck, and, as he turned around, I struck him on the nape after which he ribeted, falling face upward, when I struck him again on the left thigh. This happened about the middle part of the house, near the window.

"P. What did you do later on?

"R. I saw that he was dead, I turned him on his side and left the house.

"P. How long do you think did that instant last?

"R. About five minutes.

"P. Were you sure he was already dead when you ceased inflicting injury on him?

"R. Yes, sir, I am sure he was already dead.

"P. About what time was that?

"R. Past three o'clock." (N. t., pp. 129–130.)

Una declaración *ante mortem*, como cualquiera otra, está sujeta a impugnación legal:

"79. *Dying declaration may be impeached like other testimony.*— Dying declaration may be impeached in the same manner as other testimony. 2 Nichols Applied Evidence, 1847." (IV Rules of Court, Francisco, 576.)

Habida consideración de las heridas de Cortés, fatal una de ellas, y el tiempo transcurrido, próximamente una hora, desde que él cayó hasta que llegaron los testigos Tuazon, David, Mendoza y Bundoc, sucesivamente al lugar donde yacía, son improbables las declaraciones *ante mortem* que éstas atribuyen a aquél:

"43. *Declaration of declarant who lost consciousness because of injury sustained, inadmissible.*—* * * And where the *injury is such as to deprive the declarant of consciousness his alleged dying declaration are inadmissible.* Mitchel *vs.* State, 71 Ga. 128. (IV Rules of Court, Francisco, 568). (Las cursivas son nuestras.)

En el caso de autos existe el detalle de que si realmente Cortés volvía del trabajo no debió haber pasado enfrente de la casa de los esposos Pineda: (*a*) porque hay una senda corta, vecinal del semillero a su casa y, (*b*) sobre todo, si llovía no iba a hacer un recodo largo, sino todo lo contrario, se hubiese dado prisa en llegar a su casa. Este es un dato que contradice las manifestaciones atribuidas a Cortés, de que se retiraba a su casa cuando se albergó de la lluvia en la de los esposos Pineda, que le invitaron a pasar.

Además el jefe de policía de La Paz, Gonzalo Aquino, que en la tarde de autos ha sido avisado en su casa de que Ruperto Pineda se presentó a la policía de guardia en la casa municipal, se apersonó en su oficina, vió a Pineda, fué en busca de transportación, encontró un jeep, salió para el sitio de Alambre y llegó a la casa de Pineda a las 3:45, lugar y hora en que halló a Gelacio Cortés, ya cadáver. A juzgar por la hora precisa que ha dado, llegó a la escena del suceso antes que Felipe Tuazon, quien dijo que a las 4 de esa tarde encontró en el camino para el municipio de La Paz a Ruperto Pineda y, después de hablarle, se dirigió a la casa del mismo, hallando allí a Cortés con vida aún y fuerzas para decirle:

"I did not commit any sin, yet they boloed me."

El Ministerio Fiscal, para cohonestar de alguna manera la declaración de este testigo con la de Felipe Tuazon, después de un receso de la vista, le preguntó a qué clase de hora se refería y el testigo le contestó: "It is that standard time." (N. t., pág. 77.)

Pero, como los dos, Tuazon y Aquino, se guiaban de la altura del sol para apreciar la hora, más o menos exacta de su llegada a la casa de Pineda, resulta que sus cálculos tenían por base el "standard time."

Quedan por considerar las supuestas confesiones hechas por Ruperto Pineda y Cesarea Galas en sus respectivos affidávits Exhíbitos F y G, fechados ambos el 29 de junio de 1945, pero que en realidad de verdad, según el mismo Alcalde Félix Dungca del municipio de La Paz, fueron firmados ante él en la mañana del día siguiente, 30 de junio.

El Jefe de Policía Gonzalo Aquino declaró que en la noche del 29 de junio de 1945 investigó a Ruperto Pineda y Cesárea Galas, en la casa municipal de la Paz; escribió a mano sus testimonios y cada uno de ellos firmó lo suyo; al día siguiente, 30 de junio, fueron reescritos a maquinilla y son ahora los affidávits Exhíbitos F y G, que Pineda y Galas, respectivamente suscribieron

ante el Alcalde Félix Dungca. Mas, repreguntado si podría producir aquellas declaraciones de Pineda y Galas escritas a mano en la noche del 29, contestó:

"They existed before but they are now missing." (N. t., pág. 75.)

Pineda y Galas, unánimes y contestes, declararon que en esa noche del 29 de junio de 1945 fueron investigados por el Jefe de Policía Gonzalo Aquino, y ellos le relataron el suceso como lo hacían ante el Juzgado, pero que no firmaron en esa noche ningún documento o declaración, y si suscribieron, respectivamente los Exhíbitos F y G al día siguiente, fué porque el Alcalde Dungca les aseguró:

PINEDA—

"R. I sign it because the mayor of La Paz told us that we should do it so that we would be sent to Tarlac, and, if we had a lawyer we could acquit ourselves from accusations." (N. t., p. 134.)

GALAS

"Q. Under what circumstances then did you sign this Exhibit G?

"A. They told me, "you have to sign this; in case you go to Tarlac and you have an attorney, you might be acquitted.

"Q. Were you told that, "you might be acquitted or you will be acquitted?

"A. They did not tell me that; they told me: You can proceed to Tarlac and find an attorney and you can be saved.

"Q. In that case nobody told you that if you get a lawyer you . . .

"A. The mayor was the one who told me.

"Q. Did he tell you that you will be saved if you get the services of a lawyer?

"A. He told me so." (N. t., págs. 209–210.)

Según estos esposos, ambos iliteratos—sólo aprendieron a firmar sus nombres, no sabían el contenido de dichos affidávits Exhíbitos F y G, porque ninguno les había leído, ni enterado antes de firmarlos por orden del Alcalde Dungca. Leyendo el testimonio prestado por cada uno de ellos, salta a la vista la manifiesta contradicción entre lo que se contiene en sus expresados affidavits y lo que aseveraron ante el Tribunal. Mientras en aquéllos se hace un relato de un supuesto complot para asesinar a Gelacio Cortés, que se llevó a cabo favorecido por la lluvia, en sus declaraciones, prestadas en la vista, de las cuales no se han contradicho, no obstante las largas repreguntas a que fueron sometidos, hay, de parte de Ruperto Pineda, la exposición de una defensa legítima y, de parte de Cesarea Galas, la narración de la víctima de un sátiro, que no ha tenido intervención en la lucha que con éste sostuvo su marido, al llegar a tiempo para socorrerla.

Ruperto Pineda acudió en defensa de su esposa Cesarea Galas, mientras ésta era objeto de un atentado contra su honor por Gelacio Cortés. Sin provacación de su parte, se defendía contra una acometida para rendirla cuando su marido intervino, consiguiendo apartar a su agresor, el cual en vez de desistir de sus ataques, suspendidos en cuanto a ella, los emprende contra él, agrediéndole a puñetazos. Pineda era más alto que Cortés, éste era más robusto que aquél. La lucha bajo tales condiciones era indecisa. Pineda tenía en su cintura el bolo de trabajo que podía caer en posesión de su agresor, si era vencido, caso en el cual nadie podría prever que hubiera hecho Cortés teniéndolo en sus manos, concupiscente, frenético, *amuck* como estaba. En las incidencias de la lucha, Pineda pudo arrancar su bolo, que Cortés trató de arrebatar, sin conseguirlo, porque ya había sido herido.

La necesidad racional del medio para repeler una agresión no implica una conmensurabilidad material en los medios de ataque y defensa. Lo que exige la ley es una equivalencia racional, en cuya consideración entran como principales factores la emergencia, el peligro inminente a que se expone el agredido, el instinto, como o más que, la razón que mueven e impelen a la defensa (People *vs.* Lara, 48 Phil., 153), la propocionalidad de la cual

"* * * Does not depend upon the harm done, but rest upon the imminent danger of such injury (People *vs.* Paras, 9 Phil., 367, Rev. Pen. Code, Albert, 67),

y el finado jurista, Don Victorino Mapa, la sintetizó:

"* * * We can not require a man who finds himself so forcibly and persistently attacked as was the accused to retain the presence of mind necessary to pick and choose, and to employ some other less violent means, more especially when we remember the natural rapidity with which the defense must necessarily be made if it is to produce the effect of repelling the aggressor." (U. S. *vs.* Juan Salandanan, 1 Phil., 480.)

Ruperto Pineda, obrero del campo, vuelve del rudo trabajo, encuentra su hogar allanado, ve en él a su esposa defendiéndose de un sátiro, consigue librarla de los brazos que la oprimen para rendirla, pero tiene que afrontar un adversario resuelto, y es de la generalidad para exigirle que sopese con la razón el grado de resistencia y los medios que debe emplear para repeler, con éxito, a su agresor, sin ceder al impulso natural del instinto de la propia conservación, que reacciona, fuertemente ante el peligro.

En Estados Unidos *vs.* Damián Santa Ana y Dorotea Ramos, el Tribunal Supremo, al considerar el medio

empleado, un bolo, por Dorotea Ramos para repeler a su agresor, el ofendido, que trató de abusar de ella, dijo:

"* * * Cuando un hombre llega a un estado tal de degradación de perder todo el instinto de persona, e intenta cometer un delito tan grave, ciertamente arriesga su vida y libertad, y si pierde la primera, o si recibe alguna lesión grave no se merece otra cosa. La apelante tiene, por tanto, derecho a una absolución libre bajo el fundamento de defensa propia." (22 Jur. Fil., 257.)

En la presente causa, la defensa legítima es de apreciar, por no haber habido ninguna provocación de parte de Cesarea Galas, para el atentado torpe de que fué objeto por Gelacio Cortés, y Ruperto Pineda, en su defensa en favor de los dos, de ella y él, personalmente empleó, dadas las circunstancias del caso, un medio racional para repeler la agresión.

Con la revocación de la sentencia apelada, se absuelve a los acusados de la querella fiscal de autos y se ordena su inmediata libertad, con las costas de oficio.

Así se ordena.

Jugo y *Lim, MM.*, están conformes.

Se revoca la sentencia.

[No. 86–R (L–373). March 8, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* ANTONIO MARTINEZ and ANASTASIO ALMO, defendants and appellants.

1. CRIMINAL LAW; LESS SERIOUS PHYSICAL INJURIES; INFORMATION; JUDGMENT IN CASE OF VARIANCE BETWEEN ALLEGATION AND PROOF; OFFENSE INCLUDED IN ANOTHER.—Although the information charges defendants with conspiracy and confabulation to commit the crime of frustrated homicide, since neither said conspiracy nor intent to kill were established, the prosecution cannot by such failure build up a case of frustrated homicide nor make any of the accused liable for the acts of the other, whose responsibility is thus limited to each one's acts. In the case at bar, defendants were properly convicted of less serious physical injuries, an offense included in the crime charged, because the averments of the information specifically mention the respective wound that each accused inflicted on the person of the offended party. (People *vs.* Aquino, 36 Off. Gaz., 1886.)
2. ID; ID; MITIGATING CIRCUMSTANCE; SUFFICIENT PROVOCATION, PRESENT.—The accused may be given the benefit of the mitigating circumstance of No. 4 of article 13 of the Revised Penal Code because the act of the offended party of giving a fist blow to the son of the accused who was ignorant of the antecedents of such blow, can be considered as sufficient provocation on the part of the offended party that immediately preceded the act of said accused and that caused the commission of his offense.

APPEAL from a judgment of the Court of First Instance of Zambales. Llanes, J.

The facts are stated in the opinion of the court.

Juan Arbizo and *Antonio Gonzales* for appellants.

Assistant Solicitor-General Kapunan, Jr. and *Solicitor Reyes* for appellee.

FELIX, *J.:*

Antonio Martinez and Anastasio Almo were prosecuted in the Court of First Instance of Zambales for the crime of frustrated homicide, said to have been committed on February 10, 1944, in the municipality of Sta. Cruz of that province. After hearing both defendants were found guilty, not of the crime charged, but of less serious physical injuries separately and independently inflicted by them upon the person of Felicito Arpofo, and sentenced Antonio Martinez to four months one day of *arresto mayor,* and Anastasio Almo to four months of *arresto mayor.* Each of these defendants was further sentenced to the accessories of the law, to indemnify the offended party in the sum of ₱230.50, with subsidiary imprisonment in case of insolvency, and to pay one-half of the costs. From this decision both defendants appealed to the Supreme Court that, after the recreation of the Court of Appeals, certified this case to this Court.

The evidence of record shows that in the afternoon of February 10, 1944, after a game of Mah-jong was over in the house of Paz Estrada de Martinez, situated in the municipality of Sta. Cruz of the Province of Zambales, there was an altercation between the alleged offended party, Felicito Arpofo, and the owner of the house, Mrs. Martinez, regarding the payment of a certain debt incurred in connection with the game. In the heat of the discussion, Arpofo, who enjoyed the reputation of being a bully, became insolent, and addressing Mrs. Martinez said: "Haga salir a la persona de quien te enorgulleces tanto para hacerle rodar por el suelo." (Let the man you are so proud of come out, and I will knock him down.) Upon hearing this brag, Anastasio Almo, eldest son of Mrs. Martinez, rushed out of the back door armed with a bolo, stabbed Felicito Arpofo on the back, causing him a wound, non-penetrating, left vertebral line, level of the seventh thoracic vertebra, 1½ inches long and 2 inches deep, running medialward, downward and inward, and then got away running down the stairs. Arpofo pursued him, but upon reaching the foot of the stairs he was met by Ernesto Martinez, a son of defendant Antonio Martinez, handling a pen-knife known as "balisong." It is to be stated here that from the ground floor of the house Ernesto Martinez

had heard the altercation between the offended party and Mrs. Martinez, and if he did not intervene before it was because he was prevailed upon by the witness Cesar Regudo. But when Arpofo rushed downstairs chasing his step-brother, he came to the encounter of the offended party who, upon seeing his attitude and believing that he was going to be injured, gave Ernesto a fist blow on the face. At this juncture constable Ditona arrived and held both Ernesto and Arpofo by the arm. While the latter was requesting the constable to release him because he was wounded, the accused Antonio Martinez, who had seen the act of the offended party in hitting his son, approached the group and stabbed Arpofo from behind, inflicting upon him a stab wound, penetrating medial to the lower angle of the scapula, right side, one inch long and 2½ inches deep, running lateralward downward and inward. Like his step-son and co-accused, Antonio Martinez fled and locked himself in the house after wounding the offended party. After receiving these two stab wounds Arpofo ran to look for Doctor Purugganan and was taken to the hospital where he remained confined for nine days, after which he left to avoid further expenses, receiving, however, further medical assistance in his house. The treatment of one of the wounds lasted 28 days and the other two weeks, wounds which come within the legal classification of less serious physical injuries (art. 265 of the Revised Penal Code). For the medical treatment he received the offended party spent ₱3,000 in Japanese military notes, and the exchange rates between the Japanese notes and the Philippine currency in or about April of 1944 (as computed by Mr. Ballentine and made of record in Malacañan), was six to one, so that the ₱3,000 in Japanese military notes was then worth ₱500 in genuine Philippine currency.

From the foregoing narration of the facts proven at the hearing, it is evident that there was no conspiracy or confabulation between the two defendants to assault and stab Felicito Arpofo, and that in acting as they did to carry out their respective purposes, none of them intended to kill the offended party. Such being the case, the participation of each of them constitutes a separate and different crime of less serious physical injuries, which each of them independently inflicted on the person of the offended party.

Appellants, however, contend that since the information charges them with conspiracy and confederation to commit the crime of homicide which was frustrated, and since such conspiracy and confabulation was not established by the proof, it cannot be maintained that the crime for which appellants had been found guilty is included in the crime charged. This reasoning cannot stand against the provi-

sions of section 4 Rule 116 of the Rules of Court which reads as follows:

"SEC. 4. *Judgment in case of variance between allegation and proof.—When* there is variance between the offense charged in the complaint or information, and that proved or established by the evidence, and *the offense as charged* is included in or *necessarily includes the offense proved, the defendant shall be convicted of the offense proved included in that which is charged,* or of the offense charged included in that which is proved."

Now, section 5 of the same Rule 116 provides:

"SEC. 5. *When an offense includes or is included in another.*—An offense charged *necessarily includes that which is proved, when some of the essential elements or ingredients of the former, as this is alleged in the complaint or information, constitute the latter.*"
* * *

It is true that in the information filed in this case, both defendants are charged with having conspired together to commit the crime of homicide, which was frustrated, but the averments of the information specifically mentioned the respective wound that each defendant inflicted on the person of the offended party, so that when the proofs failed to show conspiracy and that any of the defendants intended to kill the offended party, the prosecution by such failure could not build up any case of frustrated homicide nor make any of the defendants liable for the acts of the other, whose responsibility was thus limited to each one's acts. Because of this principle on conspiracy, the Supreme Court held in a case where it appeared that "only one of the defendants committed homicide at the time of perpetrating the robbery, said homicide not having been the subject of the conspiracy nor the others having had any intervention in said homicide, the author of the homicide is the only one responsible for the complex crime of robbery in band with homicide, the other defendants being responsible only for the robbery in band." (People *vs.* Basisten, 47 Phil., 493.) In the case at bar, each of the defendants was, therefore, properly convicted of the crime resulting from his respective acts, *which was included in the charge alleged in the information and proven at the trial.* (People *vs.* Aquino, 36 Off. Gaz., 1886.)

Anent appellants' version as to how they happened to injure the offended party, it is to be noted that the witnesses for the defense supporting that version are the appellants themselves, Paz de Martinez, (wife and mother respectively of the defendants with whom the offended party had the altercation that started the whole incident), and Ernesto Martinez, son of Antonio Martinez, all interested parties and biased in favor of the defendants, while the witnesses for the prosecution were, all of them with the exception of Doctor Purugganan, at the scene of the crime and are disinterested persons. Furthermore, and as pointed

out by the Solicitor General, the version given by appellant Almo is utterly inconsistent with his statement in Exhibit D, wherein he admitted that he intentionally stabbed the offended party on account of the insulting words the latter said to his mother. This Court entertains no doubt that the crime was developed as described by the witnesses for the prosecution, from whose testimonies the above statement of facts was taken.

The lower court appreciated against defendant Antonio Martinez the aggravating circumstances of treachery and of having committed the crime in contempt of or with insult to the public authority (Nos. 16 and 2, art. 14, Revised Penal Code), without any mitigating circumstances. Although in the case of this defendant the circumstance of defense of relatives cannot be appreciated in his favor, not only because the elements for the existence of such circumstance were not in whole or in part established (art. 11, No. 2, Revised Penal Code), but also because at the time appellant Antonio Martinez assaulted treacherously the offended party, the latter's aggression on Ernesto Martinez had already ceased for the reason that Felicito Arpofo had already been held by the constable, and there was no aggression then to be repelled, yet we believe that this appellant may be given the benefit of the mitigating circumstance of No. 4 of article 13 of the Revised Penal Code because Arpofo's act of giving a fist blow to Ernesto Martinez, Antonio's son, who was ignorant of the antecedents of such blow, can be considered as sufficient provocation on the part of the offended party that immediately preceded the act of said appellant and that caused the commission of his offense.

With regard to Anastasio Almo, the lower court properly appreciated and offset the aggravating circumstance of treachery by the mitigating circumstance of sufficient provocation or threat on the part of the offended party immediately preceding the act (No. 4, Art. 13, Revised Penal Code), and considering that Almo's crime was also committed in the proximate vindication of an offense (Art. 13, No. 5, of the Revised Penal Code) that he took so seriously (U. S. *vs.* Ampar, 37 Phil., 201), this Court will also appreciate in his favor this mitigating circumstance.

Wherefore, appellants Antonio Martinez and Anastasio Almo are found guilty of the less serious physical injuries that each of them inflicted on the person of Felicito Arpofo and, in accordance with the provisions of articles 13 (No. 4), 14 (Nos. 2 and 16), 46, 64 (Nos. 3 and 4) and 265 of the Revised Penal Code, defendant Antonio Martinez shall suffer the penalty of four months and one day of *arresto mayor*. With regard to defendant Anastasio Almo, in accordance with articles 13 (Nos. 4 and 5), 14 (No.

16), 46, 64 (Nos. 2 and 4) and 265 of the Revised Penal Code, he is sentenced to undergo one month and one day of *arresto mayor*. Both defendants-appellants are also sentenced each to the accessories of the law, to indemnify the offended party in the sum of ₱250 or to suffer for the corresponding subsidiary imprisonment in case of insolvency, and to pay one-half of the costs. With these modifications, the decision of the lower court is affirmed.

It is so ordered.

Torres and *Endencia, JJ.*, concur.

Judgment modified.

[No. 576–R. March 10, 1947]

JOSE V. SAMANIEGO, CARMEN SAMANIEGO, ELISA SAMANIEGO, JULIO SAMANIEGO, and ANTONINA VILLAJIN, plaintiffs and appellees, *vs.* AGATON VILLAJIN, defendant and appellant.

1. CO-OWNERSHIP; HEIRS; LEASEHOLD RIGHTS MAY BE SUBJECT OF CO-OWNERSHIP.—Under article 372 of our Civil Code, co-ownership may exist as to rights, and is not limited to corporeal things. Upon the death of the lessee, his rights as such were transmitted to his heirs, since the death of the lessee is not among the causes that terminate a lease of rural lands; and article 1112 of the Civil Code expressly provides that rights acquired by virtue of an obligation are transmissible in accordance with law, should there be no stipulation to the contrary.
2. ID.; ID.; CONTRACTS; SUBROGATION OF HEIRS; ESTOPPEL.—The subrogation of the heirs of the deceased lessee having been expressly accepted by the lessor, the heir who signed the contract and accepted it in behalf of his coheirs, cannot now deny the undivided common interest of the said coheirs in such lease.
3. ID.; ID.; ADVERSE POSSESSION OF CO-OWNER, NOT PRESUMED.—As trustee for his coheirs, an heir cannot claim adverse possession against them in the absence of clear, complete and conclusive evidence that his repudiation of the trust was brought home to the other coheirs. (Bargayo *vs.* Camumot, 40 Phil., 857; De Borja *vs.* De Borja, 59, Phil., 19, 23.) Adverse possession by a co-owner is not presumed. (Cortes *vs.* Oliva, 33 Phil., 480.)

APPEAL from a judgment of the Court of First Instance of Batangas. De la Rosa, J.

The facts are stated in the opinion of the court.

Tomas Yumul and *Manuel P. Calanog* for appellant.

Simon Samaniego for appellees.

REYES, J. B. L., *J.:*

This action for partition and accounting was initiated by plaintiffs-appellees against defendant-appellant in the Court of First Instance of Batangas, to obtain a declara-

tion that the leasehold rights to eight lots in the Hacienda de Nasugbu were held by appellant Agaton Villajin for the account and benefit of all the heirs of the late Saturnino Villajin, and to compel said appellant to render an accounting of his administration. Appellant set up the defense that the lease in favor of the late Saturnino no longer existed, because he had been subrogated therein; and that he had possessed the leasehold adversely to the plaintiffs since the death of Saturnino in 1920. He also filed a cross claim for the recovery of possession of lots Nos. 225 and 261 of the Hacienda de Nasugbu. The trial court, after receiving evidence, rendered decision against the defendant as follows:

"En su virtud, se dicta sentencia (*a*) declarando que las parcelas de terreno conocidas como partidas Nos. 575, 577, 580, 591, 592 y 576, de la Hacienda Nasugbu de Roxas y Cía, que anteriormente habían sido cedidas en arrendamiento a Saturnino Villajin, fueron, después de la muerte de éste, dadas también en arrendamiento a Agaton Villajin y coherederos, siendo estos últimos Antonina Villajin, Anicio Villajin y la hoy finada Crisanta Villajin, representada ésta por sus hijos José, Carmen, Elisa y Julio Samaniego, y deben ser repartidas entre todos ellos en partes iguales; (*b*) condenando al demandado Agaton Villajin a que, dentro del término de 30 días desde que quede firme esta decisión, rinda cuentas de toda su administración de las expresadas partidas de terreno, de lo contrario, se hara la liquidación requerida, basada de las cuentas presentadas por los demandantes; y (*c*) sobreseyendo la contrademanda del demandado."

The defendant appealed from the judgment.

At the hearings in the Court below the parties stipulated the following:

"(1) Que las seis parcelas de terreno, que en la demanda de autos se identifican con los números 575, 577, 580, 591, 592 y 576 pertenecen a la Hacienda de Nasugbu de la propiedad de Roxas & Co., y fueron cedidas en arrendamiento a Saturnino Villajin en vida de éste;

(2) Que el referido Saturnino Villajin falleció en 4 de agosto de 1920;

(3) Que dicho Saturnino Villajin tuvo dos hijas legítimas, llamadas Crisanta Villajin, hoy finada, y Antonina Villajin, la aquí demandante, y los demandantes José, Carmen, Elisa, y Julio Samaniego son hijos legítimos de la expresada Crisanta Villajin;

(4) Que el demandado Agatón Villajin es hijo ilegítimo del repetido Saturnino Villajin;

(5) Que el contrato de arrendamiento a favor de Saturnino Villajin fue cancelado después de la muerte de éste o sea en 11 de septiembre de 1921;

(6) Que en el libro de cuentas corrientes de la Hacienda de Nasugbu aparece, en su página 268 que a la muerte del referido Saturnino Villajin era en deber a la expresada hacienda en la cantidad de ₱3,772.09, balance sobre el cual aparece esta nota:

'Conforme con esta cuenta, Nasugbu, 11 de septiembre de 1921. (Fdo. Agaton Villajin.)'

(7) Que a raíz de la muerte del referido Saturnino Villajin, Agatón Villajin fué quién mandó labrar las referidas seis parcelas

arrendadas de la Hacienda Nasugbu, con excepción de algunas porciones que fueron labradas por la misma Hacienda Nasugbu;

(8) Que en el libro de contratos de arrendamiento de la Hacienda Nasugbu, aparece el contrato de arrendamiento No. 26 a nombre de Agatón Villajin y co-herederos, sobre ocho partidas de terreno de la Hacienda Nasugbu, los números de las cuales son: 225, 261, 575, 577, 580, 591, 592, 576, contrato este que aparece firmado por Agatón Villajin en 1.° de enero de 1923, y al dorso de su última página aparece la siguiente nota:

> 'Por mutuo convenio y con autorización Don J. C. Zabarte, se traspasa a nombre de Crisanta Villajin las dos partidas de regadio Nos. 225, y 261 al fo. 50.
>
> Nasugbu, 9 de julio, 1925.
>
> (Fdo.) A. de Villajin
> Crisanta Villajin
>
> O.K. por orden de D. J. C. Zabarte.
> (Fdo. B. Rosales

(8-a) Que las referidas parcelas, números 225, 261, 575, 577, 580, 591, 592 y 576, eran las mismas que el finado Saturnino Villajin tenía en arrendamiento de la Hacienda Nasugbu (t. s. n., p. 5).

(9) Que las dos partidas de terreno que se transfirieron de acuerdo con la nota anterior a Crisanta Villajin constituyen las dos partidas de terreno objecto de la contrademanda alegada en la contestación; y

(10 Que los demandantes admiten que en la fecha de la muerte de Saturnino Villajin, este debía a la Hacienda de Nasugbu la suma de ₱3,772.09."

The plaintiffs-appellees further proved that when Saturnino Villajin felt his end approaching, he summoned the appellant Agaton, who was the elder of his sons, to take care of the lands under lease. His legitimate daughters, Antonina and Crisanta, and the other illegitimate son, Anicio, agreed. Upon their father's death the arrangement was continued and upon the expiration of the contract, the owners of the Hacienda de Nasugbu, executed a new contract for the same lots held by the late Saturnino, but this time in the name of Agaton Villajin *y cohererederos*. While most of the crops went to the lessors to pay for the indebtedness of the late Saturnino, appellant Agaton Villajin used to render account of his management to Crisanta Villajin, until she died. In 1936, when the debt of Saturnino was totally paid, the appellees demanded that the lots under lease be divided, but Agaton refused. They resorted to the managers of the Hacienda de Nasugbu, who tried to settle the matter amicably; but Agaton remained obdurate, and the lessors advised the parties to take the matter to court. On October 1, 1940, the case was filed in the Court below.

Appellant contends that there could be no co-ownership in the leasehold rights of Saturnino Villajin after the latter's death. In this appellant is in error. Under Article 372 of our Civil Code, co-ownership may exist as to *rights*, and is not limited to corporeal things. Upon Sa-

turnino's death, his rights as lessee were transmitted to his heirs, since the death of the lessee is not among the causes that terminate a lease of rural lands; and article 1112 of the Civil Code expressly provides that rights acquired by virtue of an obligation are transmissible in accordance with law, should there be no stipulation to the contrary. We conclude, therfore, that the rights of Saturnino Villajin under his lease contract with Roxas y Cia., owners of the Hacienda de Nasugbu, formed part of his estate and descended to his children, Agaton, Anicio, Antonina and Crisanta, as co-owners, the latter's share being in turn acquired by her legitimate children, appellees Samaniego. The lessors have in fact recognized this descent, by executing after the death of Saturnino a contract over the same lots in favor of Agaton Villajin *y cohererederos* (Exhibit A), which in effect is a lease in favor of the community.

The subrogation of the heirs of Saturnino Villajin having been expressely accepted by the lessor, the appellant Agaton Villajin, who signed the contract and accepted it in behalf of his coheirs, can not now deny the undivided common interest of the plaintiffs in such lease. He must therefore be held as a managing co-owner and trustee for the other heirs of Saturnino Villajin, and is liable to account for his management. The preponderance of evidence shows that he acted as such administrator for his co-owners until 1935.

The contention of the appellant that he held the leasehold independently from Saturnino and his other coheirs, is untenable. As trustee for his coheirs, he can not claim adverse possession against them in the absence of clear, complete and conclusive evidence that his repudiation of the trust was brought home to the other coheirs. (Bargayo *vs.* Camumot, 40 Phil., 857; De Borja *vs.* De Borja, 59 Phil., 19, 23.) Adverse possession by a co-owner is not presumed. (Cortes *vs.* Oliva, 33 Phil., 480.)

"Ordinarily, possession by one joint owner will not be presumed to be adverse to the others, but will, as a rule be held for the benefit of all. Much stronger evidence is required to show an adverse holding by one of several joint owners than by a stranger; and in such cases, to sustain a plea of prescription, it must always clearly appear that one who was originally a joint owner, has repudiated the claims of his co-owners, and that his co-owners were apprised or should have been apprised of his claim of adverse and exclusive ownership before the alleged prescriptive period began to run." (Case cited, at p. 484.)

The rule has particular application in this case, where the allowance of appellant's claim of adverse possession would result in depriving the legitimate descendants of the late Saturnino of any share in his estate, for the benefit of the appellant who is only an illegitimate child.

The testimony of Mariano Salamanca, that upon the death of Saturnino Villajin in 1920, the lots leased to him were taken away by the lessors and converted into "plantación Utod" and leased exclusively to the appellant, is belied by the execution of the lease contract in favor of Agaton Villajin "y coherederos," in 1923. And contrary to appellant's contention, the contract Exhibit 2, in the name of Agaton Villajin exclusively, does not constitute sufficient proof of repudiation of the trust. The authenticity of said Exhibit 2 is vouched for only by the appellant. No officer or employee of the lessors certified it. Although executed in 1926, it bears number 24, when Exhibit A, executed in 1923, is numbered 26. There is no evidence that appellees learned of its execution.

Appellant also claims that the segregation of lots 225 and 261 in July, 1925, and their subsequent lease to the late Crisanta Villajin, mother of the Samaniegos, constitutes a settlement and partition. It does not appear in what concept the segregation was had; and at any rate it could not operate to deprive the other children of Saturnino, appellees Antonina and Anicio, of their lawful share without their consent. (Civil Code, art. 1080.)

As to the counter-claim, no evidence was adduced to support it and in fact appellant does not assign its rejection by the lower Court as an error. Moreover, his contention that the transfer of lots Nos. 225 and 261 to Crisanta Villajin was by way of settlement of her claims contradicts his counterclaim that the transfer was made upon condition that said lots would be returned on demand.

It appearing from the records that appellant litigated this case on the theory of exclusive ownership in himself, and has not interposed any special defense on the accounting, we are of the opinion that the case should be remanded for further proceedings in the Court below, to ascertain the shares of each party, and for the allocation of such indemnities as may be due for fruits, improvements, labor and expenses. (Trinidad *vs.* Archbishop, 55 Phil., 801.)

No reversible error having been committed in the judgment of the Court below, the same is affirmed with costs against appellant.

A. Reyes and *Gutierrez David, JJ.*, concur.

Judgment affirmed.

[No. 442–R. March 17, 1947]

EULALIO M. DE LEON, plaintiff and appellee, *vs.* DY KIET, Administratrix of the estate of the deceased ATANASIO TAN DE HUA, defendant and appellant.

1. EVIDENCE; LOSS OF PAPERS; DEFENSES BASED ON LOSS OF PAPERS, HOW CONSIDERED.—Loss of papers has been an ever ready refuge since the world war. and defenses based thereon should

be scrutinized with care and suspicion, especially as in the case at bar where satifactory proof of the existence of the supposed papers had not been submitted.

2. ID.; OBLIGATION AND CONTRACT; PAYMENT; BURDEN OF PROOF OF PAYMENT.—The burden of proof as to payment rests on the party claiming the same, who must prove it by preponderance of evidence.
3. OBLIGATION AND CONTRACT; LEASE; RESPONSIBILITIES OF PARTIES IN CASE OF FORTUITOUS EVENT.—None of the parties can be held to account for a fortuitous case, so each party must bear his own loss without the right to pass it to the other.
4. EVIDENCE; JUDICIAL NOTICE; JAPANESE OCCUPATION DID NOT PREVENT OPERATION OF CINEMATOGRAPHS.—The court can take judicial notice of the fact that the Japanese Occupation did not prevent the operation of cinematographs. If no films were available from America, films could be secured from Manila or Japan. Consequently, it can not be said that the war rendered impossible the prosecution of the business for which the building was leased.

APPEAL from a judgment of the Court of First Instance of Iloilo. Blanco, J.

The facts are stated in the opinion of the court.

Pablo Oro for appellant.
Tirso Ezpeleta for appellee.

LABRADOR, *J.:*

This is an action by the plaintiff to foreclose a mortgage executed by the deceased Atanasio Tan De Hua of a certain parcel of land, with improvements thereon, in the municipality of Iloilo, covered by transfer certificate of title No. T–23127 of the office of the register of deeds for the Province of Iloilo. The mortgage was executed by the said deceased to secure the payment of the rents of a cinematograph building belonging to the plaintiff situated in the municipality of La Paz, Province of Iloilo. The contract of lease, which was introduced in evidence in the course of the trial as Exhibit A, provides that the lessee Atanasio Tan De Hua shall pay the rents of the building at the rate of ₱1,200 every six months, in advance, the first payment to be due on October 28, 1941. The contract of lease with mortgage was executed on October 28, 1941, and was registered in the office of the register of deeds and annotated on the transfer certificate of title on October 30, 1941.

The plaintiff alleges that inspite of the lapse of the periods specified for the payment of the rents the deceased did not pay the said rents, and prays that judgment be rendered against his administratrix for the rents agreed upon, *i. e.*, ₱4,800, plus the sum of ₱200 stipulated in the a contract of lease as attorney's fees in case of a foreclosure of the mortgage, and for the execution of the mortgage upon failure to make the payment to be decreed. The defendant alleges, as special defense, that the obligations men-

tioned in the contract of lease, subject of the complaint, are impossible to perform for the reason that because of World War II the business of the deceased was totally stopped beyond his control and that the building leased has been burned, and, by way of counterclaim, that the deceased had paid the sum of ₱1,200 for the six months period from November, 1941, to April, 1942, which amount should be refunded, with costs. In his reply to defendant's answer plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the counterclaim and denied the same, and denies the alleged burning of the building, alleging that this occurred in the month of March, 1946, after the contract of lease had expired. In an amended answer, the defendant further alleges that the mortgage mentioned in the complaint should be declared null and void and ordered cancelled.

The parties having come to trial, the court at the conclusion thereof sentenced the defendant as administratrix of the estate of the deceased Atanasio Tan De Hua to pay the plaintiff the amount of ₱1,200 as rents of the building, subject of the action, for the period comprised between October 28, 1941, and April 28, 1942, with legal interest from the date of the filing of the complaint until it is finally paid, and ordered that the said amount should be deposited in the court within the period of ninety days, with legal interest and costs, otherwise, the land mortgage would be sold for the payment of the said amounts. Against this decision the defendant has prosecuted this appeal through the perfection of a record on appeal. On this appeal it is urged in her behalf that the lower court erred in finding that there was not sufficient evidence to prove the alleged payment of the sum of ₱1,200 by the deceased to the plaintiff; in not relieving the defendant from the obligation of paying the rents for the whole period of six months from November 28, 1941, to April 30, 1942; and in not applying the provision of article 1105 of the Civil Code. As the plaintiff has not appealed from the decision denying him recovery for the total amount of ₱4,800 and the attorney's fees of ₱200, we are limited in this appeal to the consideration of the questions of fact and of law presented by the defendant-appellant.

The question of fact is: Did the deceased Atanasio Tan De Hua pay the sum of ₱1,200 to the plaintiff on October 28, 1941, as agreed upon between the parties in the contract of lease, Exhibit A? The defendant testified that her husband had ordered her to prepare the sum of ₱1,200 with which to pay the lease, and that such payment was in fact made to the plaintiff on the afternoon of October 28, 1941. She introduced a witness who testified that he saw the

delivery to the plaintiff of a big amount of money at the cinematograph building, subject of the lease, which amount he believed to have been the rent of the building, as the parties were talking of the lease at the time of the delivery of the said money. The plaintiff denied that the amount of ₱1,200 was ever paid to him, and in rebuttal testified that at the time of the execution of the contract on October 28, 1941, he received a certain amount, but this amount was not in payment of the rents but in payment of the notarial and registration fees. The trial court found that the evidence submitted by the defendant is insufficient to prove the alleged payment.

We find no ground or reason for modifying this finding of the trial court, for we can not find any fact or circumstance which the trial court has overlooked, ignored, or misunderstood, and which may have induced it into error in its finding. On the contrary, the circumstances justify the said finding. If the payment had been intended at the precise time of the execution of the contract of lease, the parties would have caused to be inserted therein an acknowledgment of the payment of the rent for the first period of the lease. It can not, therefore, be presumed from the mere fact that payment was to be made on October 28, 1941, that payment of the first sum due was actually made at the time of the execution of the contract of lease. Besides, the contract of lease does not appear to have been registered on the same day of its execution, but on October 30, 1941, or two days thereafter, and this renders payment improbable before that date.

The testimonies of the administratrix and her witness to the effect that payment of the rent was made at the time of the execution of the contract of lease are not, in our opinion, satisfactory. While the witness for the defendant testified that the alleged payment was made in the cinematograph building, it seems from the testimony of the defendant that payment was made at her home, for she does not mention that payment was made at the cinematograph building. The defendant herself admitted that she had nothing to do with the contract of lease which her husband had executed, when presented with the demand for the payment of rents in the year 1943. Loss of papers has been an ever ready refuge since the world war, and defense based thereon should be scrutinized with care and suspicion, especially as in this case where satisfactory proof of the existence of the supposed papers had not been submitted.

We would have hesitated to accept the theory of the plaintiff regarding the nonpayment of the rent, because the date specified for said payment is October 28, 1941, had it not

been for the explanation made by him that he had to leave the city immediately upon the perfection of the contract, and had it not been for the fact that the trial court, which had the opportunity to observe the witnesses and appraise the value of their testimonies by the manner in which they testified in court, made a finding of such nonpayment. Besides, the burden of proof as to payment rests on the defendant, who must prove it by preponderance of evidence, and we find that the obligation in this case has not been complied with. We, therefore, decide the question of fact in the negative.

As to the legal issue raised by the appellant that the rents from the date of the war should not be paid because of the impossibility of carrying out the business for which the building was leased by defendant, it is to be noted that the contract of lease specifically fixes the first period of the lease as from November 1, 1941, to April 30, 1942, and that the rent for this period fell due on October 28, 1941, by express stipulation therein which provides that the rents for each period are payable in advance on the dates specified; namely, October 28, 1941, April 28, 1942, October 28, 1942, and April 28, 1943. The rent for the period from November 1, 1941, to April 30, 1942, had become due more than a month and ten days before the declaration of war, and as it does not appear that the deceased was prevented from taking possession of the cinematograph building and must have actually taken possession and control thereof before the war broke out, it is not right, nor just that his failure to use it thereafter for the purposes for which he leased it should be blamed on the plaintiff. It was a fortuitous case for which none of the parties can be held to account and for which each party must bear his own loss without the right to pass it to the other. It would be violative of the spirit of article 1105 of the Civil Code to hold otherwise. Besides, the court can take judicial notice of the fact that the Japanese occupation did not prevent the operation of cinematographs. If no films were available from America, films could be secured from Manila or Japan. Consequently, it can not be said that the war rendered impossible the prosecution of the business for which the building was leased.

In view of the foregoing, the court finds that the decision rendered by the trial court in this case is in accordance with the law and the evidence, and the same is hereby affirmed in all respects, with costs against the appellant.

So ordered.

Montemayor, Pres. J. and *Concepcion, J.*, concur.

Judgment affirmed.

[No. 705-R. March 18, 1947]

JOSE JAUCIAN, plaintiff and appellee *vs.* CIRIACO CHUNACO, defendant and appellant

PLEADING AND PRACTICE; COURTS; POWER OF COURTS TO GRANT PROPER REMEDY IN LIEU OF THAT SOUGHT BY A PARTY.—The mere fact that a party asked for specific remedy for a given situation does not prevent the court from determining whether the remedy sought is legal and proper, and should it be found that it is not, the court has the power and the right, if not actually the duty, to grant the proper and adequate remedy provided the same lies within its jurisdiction.

APPEAL from an order of the Court of First Instance of Camarines Sur. Prieto, J.

The facts are stated in the opinion of the Court.

J. M. Calinog for appellant.
Simeon B. Paz for appellee.

REYES, J. B. L., *J.:*

In a suit filed by the appellee against the appellant in the Court of First Instance of Camarines Sur, the appellee obtained judgment in his favor, which became final. Sometime in October, 1941, execution was issued and the Provincial Sheriff levied on a parcel of land owned by the appellant, declared under tax No. 17159 and valued at ₱620. At the sale it was awarded to the execution creditor as highest bidder. The sheriff at that time, Moises Pardo, issued a provisional certificate of sale but the same was lost upon the arrival of the Japanese Forces of Occupation. One year after the issuance of the provisional certificate of sale, no redemption having been made, the sheriff issued a final deed of sale in favor of the appellee, which was set aside by the court in an order of March 10, 1943, upon motion of defendant appellant. On March 31 of that year, the appellee filed a motion in the Court of First Instance asking for an *alias* writ of execution "to the view (sic) to carry out a provisional deed of sale in accordance with law." The defendant-appellant's attorney was notified of this motion but apparently did not appear when the same was heard on April 2, 1943, and the Court issued an order as follows:

"ORDEN

Como se pide, se instruye el shériff provincial ex-oficio que, si en esta causa se ha hecho un embargo regular de acuerdo con la ley, se expida un certificado de venta provisional a favor del aquí mocionante.

"Así se ordena.

"Naga, Camarines Sur, Abril 2, 1943.

"(Fdo.) GABRIEL P. PRIETO
Juez"

Upon receipt of the order, the clerk of court, Manuel Flores, as *ex oficio* sheriff, issued on April 5, 1943, a new certificate of sale in favor of the plaintiff. Nine days thereafter, on April 14, 1943, the defendant appellant, through counsel, asked for the reconsideration of the order of April 2, on the ground that the records did not disclose that there was a regular execution sale in accordance with law; that even if the said sale had been carried out properly, the certificate could not have been executed by the successor of the sheriff who made the sale; and that the appellant had paid the import of the original judgment, the execution having been issued, levied and carried out to satisfy the judgment for an additional amount of which the defendant was not notified. This last ground was abandoned in the appeal. After hearing, the lower court on April 26, 1943, denied the reconsideration and declared valid and efficacious the certificate of sale executed by the clerk of court as sheriff *ex officio*. Thereupon the defendant interposed the present appeal, assigning four errors.

The first assignment of error raised by the appellant is that the court erred in granting a remedy that the appellee had not asked for in his motion; that is to say, that appellee having merely asked for a *new alias* writ of execution the court should have limited itself to ordering its issuance and not the execution of a new certificate. We believe that this error has no merit, for the reason that the court had found, in an order of March 10, 1943, issued after hearing both parties and their evidence, that a provisional certificate of sale had already been issued and that the execution sale was valid (Record on Appeal, pp. 14–15). That being the case, there would have been no sense in ordering the issuance of an *alias* writ of execution since the former writ had been properly and regularly carried out. Certainly, the mere fact that a party asked for a specific remedy for a given situation does not prevent the court from determining whether the remedy sought is legal and proper, and should it be found that it is not, the court has the power and the right, if not actually the duty, to grant the proper and adequate remedy provided the same lies within its jurisdiction. Appellant's argument that the rule might lead to orders being issued without the knowledge of the opposing parties is nullified by the fact that in this particular case he was notified of the motion and should have attended the hearing of the same. At any rate, if the order caused substantial prejudice to his right, he had his own remedy of asking that the order be reconsidered and set aside, as he has done in the case at bar.

The second error assigned by the appellant is made to consist in the court's alleged delegation to the sheriff of the judicial power to determine whether or not there had

been a proper levy and sale. We believe that the error, if any, was purely formal and in no way prejudiced the rights of the appellant. It must be noted that before the order complained of was issued, the question of whether there had been a regular execution sale had been already raised by the defendant and, as a matter of fact, was litigated before the lower court. The records show that the parties submitted evidence thereon, and according to one of the orders appealed from, the court finally decided on March 10, 1943, that there had been a proper execution sale. The only defect then found was that the certificate of sale had not been recorded in the office of the register of deeds. This fact is of no moment in the present appeal, since third parties are not involved. Besides, the appellant apparently did not question the regularity of the sale before March 10, 1943; at least, there is no competent evidence in the record before us that he had complained of any such irregularities, since his previous motions and the resolution of the court thereon were not made part of the record on appeal and we are therefore unable to review the same. While defendant may be technically correct in contending that the determination of whether a sale is or is not proper should be made by the court itself and not by the sheriff, in this case there had been already a previous finding of regularity by the trial court itself in its order of March 10, 1943. Therefore the order of April 2, 1943, cause no real prejudice.

The third error attacks the pronouncement of the lower court in its order of April 26, 1943, that the successor of the sheriff who conducted the sale could validly issue the corresponding certificate. This error raises a question that is purely academic, inasmuch as the certificate of sale that was ordered issued by the court in its order of April 2, 1943, appealed from, was not the original certificate of sale but a duplicate thereof. The court had found in its order of March 10, 1943, reaffirmed in the order of April 26, of the same year (Record on Appeal, p. 13), that the former sheriff had actually issued a certificate of sale, only that, as shown in the evidence, the same had been destroyed because of the Japanese military operations in the province. If a valid certificate of sale had been properly issued by the sheriff who conducted the original execution, levy and sale, no legal objection can be made to its being reproduced by the successor in office for use in place and stead of the destroyed original.

The fourth error is assigned only as a consequence of the previous ones, and needs no separate discussion.

We conclude that the lower court did not commit any of the errors assigned. The appeal is dismissed and the orders affirmed with costs against appellant.

A. Reyes and *Gutierrez David, JJ.*, concur.

Order affirmed.

[No. 259–R (L–708). March 27, 1947]

SEVERINO MANOTOK, plaintiff and appellee, *vs.* MILAGROS S. LEGASPI and EMILIO S. LEGASPI, defendants and appellants.

1. CONTRACTS; LEASE; TERM OF LEASE IN THE ABSENCE OF AGREEMENT BETWEEN PARTIES; LONG OCCUPATION AND IMPROVEMENTS INTRODUCED BY LESSEE.—The occupation of the premises by lessees for over 4 years and the improvements allegedly introduced by them are not inconsistent with the rule that, in the absence of agreement as to the term of a contract of lease, the same shall be understood to be for the period fixed as the basis for the payment of rentals. (Art. 1581 of the Civil Code.)
2. ID.; ID.; EXPIRATION OF LEASE WITHOUT AGREED TERM; NOTICE TO VACATE, NOT NECESSARY.—The rental having been fixed upon a 15-day basis, the contract is deemed to expire at the end of every fifteen days, without further notice. (Articles 1561 and 1581 Civil Code.)

APPEAL from the judgment of the Court of First Instance of Manila. De la Rosa, J.

The facts are stated in the opinion of the court.

M. A. Zarcan for appellant.
Antonio Gonzales for appellee.

CONCEPCION, *J.:*

It appears that defendants Milagros S. Legaspi and Emilio S. Legaspi have held the ground floor of the apartment (accesoria) of plaintiff Severino Manotok, located at No. 2134 Rizal Avenue, corner of Ongsiako Street, Manila, as lessees, since the year 1941. At different times, said defendants operated on the premises a restaurant, a beauty parlor, and a studio. There was no specific stipulation as to the term of the lease, but it was agreed that the lessees would pay a rental of ₱17.50 every fifteen days. On or about August 20, 1945, they received a notice advising them that the lessor needed the apartment and that they should vacate it within five days. This notice not having been heeded, on or about September 10, 1945, Severino Manotok instituted this ejectment case, in the municipal court of Manila, against the aforesaid espouses. It was alleged in the complaint that defendants had subleased the premises to an unknown party, without plaintiff's knowledge and consent; that, notwithstanding repeated demands, the rentals from August 1, 1945, had not been paid; and that defendants had failed and refused to vacate the premises despite the notice already referred to.

After due hearing, the municipal court dismissed the case, but, on February 6, 1946, the Court of First Instance of Manila, on appeal taken by the plaintiff, sentenced

the defendants to vacate the premises in question, and to pay rentals at the rate of ₱17.50 every fifteen days from August 1, 1945, and the costs. It, also, suspended the execution of the judgment, in so far only as the ejectment of the defendants are concerned, for 3 months beginning from February 1, 1946. Defendants have appealed from this decision of the Court of First Instance of Manila.

They contend that the latter has erred: (1) in not holding that the sublease alleged in the complaint had not been proven; (2) in not holding that neither had the allegation of failure to pay rentals from August 1, 1945, despite repeated demands, been established; (3) in sentencing appellants to vacate the premises in question; and (4) in not dismissing the case, with costs against the appellee.

The last two alleged errors refer to the main question for determination in this appeal; namely, whether or not appellants should be ejected from said premises. Their counsel maintains the negative, upon the ground that appellants have held the premises in question, as lessees, for more than four years and introduced therein several improvements, thus offsetting the presumption that the lease contract expired every fifteen days; that, according to the testimony of appellant Emilio S. Legaspi, the contract of lease in his favor is for an indefinite period and "mientras le conviene"; and that such testimony is uncontroverted.

This contention is untenable. The occupation of the premises by appellants for over four years and the improvements allegedly introduced by them are not inconsistent with the rule that, in the absence of agreement as to the term of a contract of lease, the same shall be understood to be for the period fixed as the basis for the payment of rentals (art. 1581 of the Civil Code). Appellants were able to hold the premises for several years, despite the fact that the contract of lease was only for fifteen days, the rate of rentals having been stipulated upon this basis, because of tacit renewals under article 1566 of the Civil Code. The improvements may have been introduced having in mind, precisely, said tacit renewals, which generally take place indefinitely.

In fact, had there been any other agreement between the parties as to the term of the lease, the appellants would have surely testified about it. Yet, contrary to their counsel's assertion, no such evidence has been introduced. It appears, merely, that to the following question propounded by said counsel: "Ha ocupado usted (la accesoria) para 15 días?," appellant Emilio S. Legaspi replied: "Para más tiempo." Aside from the fact that it may refer solely to the *intention* of the *witness* in leasing the property, not to

his *agreement* with the appellee, the statement does not indicate that appellants had, under the contract, the right to use the premises as long as it suited them, as counsel would have the court believe.

The rental having been fixed upon a 15-day basis, the contract is deemed to expire at the end of every 15 days, without further notice (articles 1561 and 1581, Civil Code). Inasmuch as on or about August 20, 1945, defendants were advised of plaintiff's desire to use the premises and requested to vacate the same within five days from said notice, it follows that appellants' possession is illegal since, at least, September 1, 1945 (Co Tiamco *vs.* Diaz, 42 Off. Gaz., 1169, 1174; Viola Fernando *vs.* Aragon, G. R. No. L-209, April 30, 1946). In other words, at the time of the filing of the complaint herein, on or about September 10, 1945, there was an unlawful detainer on their part, and, hence, the third and fourth grounds of the appeal are clearly untenable.

So are, also, the first and second grounds. The absence of any finding in the decision appealed from as to the alleged sublease of the premises and repeated demands for the payment of rentals imply that the allegations to this effect in the complaint have not been established. The records show, however, that appellants had not paid the rentals from August 1, 1945, although they claim it was due to appellee's failure to send his agent to make the corresponding collection. At any rate, whether or not defendant subleased the premises or failed to pay the rentals, the plaintiff had, under the laws then in force, the unqualified right to terminate the contract of lease at the conclusion of every fifteen days (Co Tiamco *vs.* Diaz, *supra*; Viola Fernando *vs.* Aragon, *supra*).

The court notes that the decision appealed from suspends the execution thereof, in so far as appellants' ejectment is concerned, for a period of three months beginning from February 1, 1946. Inasmuch as this period has expired already, the question whether or not the lower court should have ordered said suspension in its decision is now a moot one. Furthermore, none of the parties has assailed the authority to include said order in the decision. Hence, the validity of the aforementioned order need not be determined in this appeal.

Without passing, therefore, upon the propriety of the provision in the decision appealed from already referred to, said decision is hereby affirmed, with costs against the appellants.

It is so ordered.

Montemayor, Pres. J., and *Labrador, J.*, concur.

Judgment affirmed.

[No. 56-R. March 28, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* GLICERIO LASA, defendant and appellant

1. CRIMINAL LAW; HOMICIDE; JUSTIFYING CIRCUMSTANCE; DEFENSE OF A STRANGER; ESSENTIAL REQUISITES OF.—For an accused to invoke the justifying circumstance of defense of a stranger successfully, he must show by clear and convincing evidence the exculpatory facts relied upon by him. (People *vs.* Berio, 33 Off. Gaz., 5.) There are three essential requisites, namely: First, unlawful aggression; second, reasonable necessity of the means employed to prevent or repel it; third, that the person defending be not induced by revenge, resentment, or other evil motives.
2. ID.; ID.; ID.; ID.; ID.; UNLAWFUL AGGRESSION; RIGHT OF ACCUSED TO REPEL THE AGGRESSION.—The belief of an accused that an attack was forthcoming, in view of the threatening and hostile attitude of the deceased, coupled with an actual external act of aggression, satisfies the essential element of unlawful aggression, justifying self-defense, or defense of strangers. (U. S. *vs.* Carrero, 9 Phil., 544, citing decisions of the Supreme Court of Spain, dated 30 October 1884; 19 March 1885, 31 October 1889, and 15 November 1889; see, also Spanish Supreme Court decisions of 26 June 1691, 46 Jur. Crim. 863; 24 Oct. 1895, 55 Jur. Crim. 169; 11 Dec. 1896, 57 Jur. Crim. 397; 29 Sept. 1905, 75 Jur. Crim. 131; 7 March 1921, 106 Jur. Crim. 178.) And, during an unlawful aggression in the course of the fight and as soon as there is danger to the life or limb of the one assaulted, the latter is entitled to repel the danger, to evade the advance and, if necessary, render him powerless. The ancient common-law rule in homicide known as "retreat to the wall" has given way to "stand ground when in the right." If the victim is where he is entitled to be, he is not expected to step aside when his assassin is rapidly advancing with a deadly weapon. (Baird *vs.* U. S., 158 U. S. 550; U. S. *vs.* Dowen, 37 Phil., 57.)
3. ID.; ID.; ID.; ID.; ID.; ID.; POLICE OFFICER IN THE PERFORMANCE OF HIS DUTY.—A police officer in the performance of his duty must stand his ground and cannot take refuge in flight when attacked. His duty is to overcome his opponent and the degree of violence that he may exert differs somewhat from that which a private citizen may offer in self-defense. Hence, if a police officer is in the performance of his duty to quell a disturbance in the public street and is attacked by the deceased, who is armed with a knife and causing the aggression, and discharges the revolver against the assailant and fatally wounds him, the police officer should be exempted from criminal liability because the force employed by him under the circumstances is reasonably necessary in the exercise of a legitimate self-defense. (U. S. *vs.* Mojica, 42 Phil., 784.)
4. ID.; ID.; ID.; ID.; ID.; REASONABLE NECESSITY OF MEANS EMPLOYED TO REPEL AGGRESSION.—The reasonable necessity of the means employed in the defense is not subordinate to the existence of the injury done but to the imminence and danger of the injury itself (U. S. *vs.* Paras, 9 Phil., 367, citing decision of Spain, dated 22 Dec. 1887). Applying this principle, it was held that if a person enters the dwelling of another and attacks one of the inmates thereof, the latter is justified in defending himself with such weapons as are at hand, and if from the

defense the aggressor dies, it is attributable to his own wrongful act. (U. S. *vs.* Brella, 9 Phil., 424.)

5. ID.; ID.; ID.; ID.; ID.; REASONABLE NECESSITY IS WHAT THE LAW REQUIRES, NOT INDISPENSABLE NEED.—One who is assaulted cannot have sufficient tranquility of mind to think, to calculate, and to make comparisons, which can be easily made in the calmness of his home. It is not the indispensable need but the reasonable necessity which the law requires; it is essential in each specific case to determine the relative necessity, whether it is more or less imperative, in accordance with the sound rules of logic.

APPEAL from a judgment of the Court of First Instance of Mindoro. Daza, J.

The facts are stated in the opinion of the court.

Teodoro R. Dominguez for appellant.

Assistant Solicitor-General Kapunan, Jr. and *Solicitor Alikpala* for appellee.

LIM, *J.:*

Glicerio Lasa was charged before the Court of First Instance of Mindoro, in two separate informations, with the murder of Ruel Beloncio and the frustrated murder of Juan Beloncio. After a joint trial held by common consent, the lower court entered a decision in which the accused was acquitted of frustrated murder, and convicted of homicide for the death of Ruel Beloncio; appreciating however in his favor three mitigating circumstances, it sentenced him to suffer a penalty of 2 years, 4 months to 4 years, 2 months of *prisión correccional,* to indemnify the heirs of the offended party in the sum of ₱2,000, and to pay the costs.

The appellant hinges his appeal on a single error, namely:

"The lower court erred in finding the defendant-appellant guilty of the crime of simple homicide beyond reasonable doubt instead of completely exempting him from any criminal liability under three justifying and one exempting circumstances, namely, (1) defense of stranger, (2) obedience to an order of a superior, (3) fulfilment of a duty or lawful exercise of a right or office, and (4) that of having acted under the impulse of an uncontrollable fear, anyone of which constitutes a sufficient ground to justify his acquittal."

The evidence in this case supports the following findings:

The accused, Glicerio Lasa, an ex-USAFFE and a Bataan veteran, was the sergeant of the guards of the provincial jail of Mindoro for approximately one and one-half months prior to this incident, under the command and direct supervision of Anacleto Atienza, provincial warden.

On 29 March 1945, the deceased, Ruel Beloncio, and his brother, Juan Beloncio, were both detention prisoners in

the provincial jail of Mindoro, awaiting trial for serious offenses, namely: two cases of murder against Ruel Beloncio, and seven cases of murder, double murder, robbery with homicide, and robbery in band against Juan Beloncio. These two brothers were known as notorious prisoners and were feared as "guerrilla men-killers." Incidentally, since the trial of this case, Juan Beloncio has been convicted and sentenced to life imprisonment in four cases, and imprisonment for an indeterminate period from 17 years, 4 months and 1 day to 20 years, and from 6 years to 12 years in two other cases. (G. R. Nos. L–290, L–291, L–293, L–295, L–298.) These Beloncio brothers formed part of a guerrilla organization of which their father, Esteban Beloncio, as alleged captain, was the commanding officer, with headquarters in Naujan, Mindoro. On 27 January 1945, or some time after the liberation of the Island of Mindoro, the American liberating forces ordered this organization to disband.

Esteban Beloncio was likewise a detention prisoner, but he had been released on or about 18 March 1945 through a writ of *habeas corpus;* the day after a new warrant was issued for his arrest, and to evade capture he had been hiding himself here and there, using even the place of Atty. Mary Concepcion-Bautista as a hideway (t. s. n. p. 76). While foiling the arms of justice, he wrote and sent a communication to Lt. Pedro R. Navarro, former executive officer of the B Company, 2nd Battalion, 61st Infantry, under the command of Juan Beloncio, captain, reading *verbatim* as follows:

"In the midst of all these trials and persecution led by Gov. J. Navarro and Ruffy, don't worry, Keep on. We shall put up all defenses where you should cooperate. Don't have that any one of us is out. We may be down at times but not out.

1. (Gone with this contactman and take along Cpl. Olympio Garcia to X place. This should be kept strictly confidential so that our presence anywhere will not be detected by anybody that will cripple us in our fight. Move by night and bring some rice and viands for our use at X place hideout.)

See O. Garcia at once as soon as possible unnoticed.

2. (Is that true that there are men looking for me there with warrant of arrest. See that none of them know my whereabout.)

3. (Good luck I wish you to come with Garcia. See if Compos can call A. Javier and Conguis to see me secretly at Ruels CP I. This must be strictly confidential.)

(Sgd.) ESTEBAN BELONCIO"

(Exhibit 2)

Detention prisoner Juan Beloncio, although an inmate of the Provincial Jail of Mindoro, also addressed and sent

through devious channels to Lieutenant Navarro the following memorandum:

"Lieut. R. Navarro (667011)
Executive Officer

SIXTH MILITARY DISTRICT
H.Q., B Co., 2ND. BN, BOLO AREA, 61st INF.
PHILIPPINE ARMY * * * USAFFE

16 March '45

Memorandum for—
All Unit Commanders

1. Upon receipt of this order, report immediately to the undersigned for very important conference re—orders and instructions received from Higher Headquarters, 2nd Military District (Panay).
2. For strict and immediate compliance.

(Sgd.) JUAN BELONCIO II
JUAN BELONCIO II (66659)
3rd Lieutenant, Infantry
Commanding"

Copy furnished:

All Unit Commanders concerned 1
File 1
JOB vje

Addenda:

1. Conference to be held on 24 and 25 March '45, 1004, at X place.

(Sgd.) JOB II"

(Exhibit 1)

The X place mentioned in these two documents (Exhibits 1 and 2) as verbally explained by the couriers to Lieutenant Navarro, meant "Ruel's CO" or the command post of Ruel Beloncio, located somewhere outside Calapan, Mindoro. Certainly, it could not refer to the provincial jail of Mindoro, as Juan Beloncio pretended during the trial.

But Lieutenant Navarro was reluctant to partake in the subversive and rebellious schemes of the Beloncio brothers, who were palpably gathering followers and partisans to fight and upthrow the constituted government. So, soon as he was handed these messages (Exhibits 1 and 2), and about 3 days prior to 29 March 1945, he journeyed to Calapan to look and report to his relative, Juan Navarro, then Provincial Governor of Mindoro. Undaunted by the absence of this official, then in a trip to Manila, Lieutenant Navarro turned around to the Provincial Secretary, to whom he explained the situation and delivered the two messages above quoted (Exhibits 1 and 2), after tearing off from Exhibit 2 the upper left portion in which his name was written, and thus avoid any undesirable implication.

The Provincial Secretary immediately sought for the accused, Glicerio Lasa, in his capacity as sergeant of the guards of the provincial jail of Mindoro, and revealed to him the contents of these two messages (Exhibits 1 and 2),

in so far as they concerned the jail-break plot devised by the Beloncio brothers. Sergeant Lasa soon after relayed the information to Warden Atienza, as his immediate superior. Prior to 29 March 1945, Warden Atienza, for reasons undisclosed but of easy detection and comprehension, had been tolerating the Beloncio brothers to leave the prison limits. Alerted by the timely disclosure from Lieutenant Navarro, Warden Atienza since then gave a standing order not to allow the said Beloncio brothers to go beyond the jail liberties without his permission.

On 29 March 1945, between 10 and 11 o'clock in the morning, in accord with an understanding had the day before, Atty. Mary Concepcion-Bautista, Lucia Kalayaan-Acevedo (Mrs. Juan Beloncio), and Ester Beloncio, sister of Ruel and Juan Beloncio, went to the provincial jail of Mindoro to visit these two brothers. As Warden Atienza was then out from the premises, Attorney Bautista secured from Sergeant Lasa, next in command, his leave to see the Beloncio brothers. Sergeant Lasa instructed guard Abelardo Patolan, then on detail in the prison kitchen, to take the visitors to the prison cell of the Beloncios, located in the second floor of the prison building. Shortly thereafter, these three visitors and the Beloncio brothers climbed the stairs and proceeded towards the guardhouse, where the appellant was filling up some administrative forms regarding the subsistence of the prisoners. Ruel Beloncio, Attorney Bautista and Juan Beloncio entered the guardhouse, one after the other, and asked leave from Sergeant Lasa to go out from the prison compound, with the excuse that they wanted to hold a conference with their other lawyer, Attorney Hernandez. Sergeant Lasa answered each one, in succession, that he could not grant their request without an express permission from Warden Atienza. As the prisoners and their visitors became restless and impatient, Sergeant Lasa sent out, at their request, guard Reynaldo Onal to look for Warden Atienza. It took Onal some time to locate the warden.

As soon as Warden Atienza had arrived and had entered the guardhouse, Ruel Beloncio said: "We are going out." The warden answered: "Why, you can go out, provided that you will not stay long outside. The trouble with you is that whenever you are out of the jail you stay too long." Ruel, true to form, countered: "Ah, we are not prisoners, why should we wait * * * may be you don't know the persons with whom you are talking with * * *"; Juan Beloncio interrupted him and said: "We are officers." To which Ruel added: "Warden, you take off your uniform and let us fight." The warden, molested, yet unruffled, replied: "I cannot fight with you and you must understand

that I regard you as Holy Christ, and as a matter of fact, I do not oblige you to sweep the room like the other prisoners." Ruel came back: "This is not the type of men whom you can order to sweep the floor." Attorney Bautista then intervened, by saying: "There is no need for insult and blasphemy, Mr. Warden." Ruel, defiant and arrogant: "Look in the records of the CIC and you will find that we are to be treated with courtesy due to our rank."

At this juncture, Juan Beloncio came rushing into the guardhouse, pushed the warden and while shouting: "Stop your philosophizing," he dashed towards Sergeant Lasa, with the intention of getting possession of one of the Japanese rifles that were kept leaning against the wall behind him. As Sergeant Lasa prevented or stopped him from reaching the rifles, Juan Beloncio grabbed in anger and crumpled all the papers in front of Sergeant Lasa, and flung them at his face. While rushing towards the door of the guardhouse, Juan yelled: "I will kill you all."

Almost simultaneously and vent to accomplish that which his brother failed to do, Ruel Beloncio, who was bigger and stronger than Warden Atienza, reached out and tried to grab a revolver from the latter's right hip pocket. Sergeant Lasa, alerted by Ruel's move, took the Garand rifle leaning near him. On seeing that Ruel was about to overpower Warden Atienza for the possession of the revolver, confirmed by the latter's repeated orders to shoot, and apprehensive that once Ruel, the notorious man-killer, had possession of the revolver, he would kill not only the warden but also the rest of the people inside the guardhouse, Sergeant Lasa, without taking aim, fired at Ruel with the Garand rifle, and felled him to the ground.

As Sergeant Lasa stepped to the door he saw Juan Beloncio running towards the outside gate of the jail compound, and knowing that it was his duty to prevent him from escaping, he shouted a command for him to stop; upon Juan's refusal to obey the order, Sergeant Lasa fired a shot in the air to scare and possibly stop him. Failing again in this and while holding the rifle in his hands, he ran after Juan Beloncio until he reached the PCAU building, where he saw Juan Beloncio entering a few moments before his arrival. Sergeant Lasa was met by a certain Lieutenant Anderson, of the PCAU office, to whom, in answer to a question, he explained: "Juan Beloncio escaped from the jail and he is here." Lieutenant Anderson replied: "Never mind, he is under guard." Sergeant Lasa then left the PCAU building and walked towards the municipal building, with the intention of reporting to the chief of police. He was accosted on his way by a certain Mr. Claxton, CIC (Counter Intelligence Corps, U. S. Army)

special agent, who asked him for particulars of the commotion; Sergeant Lasa replied: "I shot Ruel Beloncio and Juan Beloncio escaped from jail." Upon hearing further that he was about to report to the chief of police, Claxton told him: "Don't report, you are under my custody."

At this, Sergeant Lasa returned to the provincial jail; while there Warden Atienza showed him the rip on the hip pocket of his pants, torn by Ruel Beloncio while grabbing the revolver inside such pocket.

On the same day, some CIC agents investigated the personnel of the provincial jail of Mindoro, with the exception of guard Abelardo Patolan, but Warden Atienza refused to give any written statement, asserting that he was not willing to make any unless it was to a person of his trust and confidence. True to his plan, he looked for Atty. Augusto Valencia, in the belief that he was still the acting provincial fiscal for Mindoro, and not knowing that he had ceased since 27 March 1945, as a result of the general withdrawal of all previous appointments made by the Philippine Civil Affairs Unit (PCAU) of the U. S. Army, in line presumably with the announced policy of turning over the civil government of the liberated areas to the properly constituted authorities of the Commonwealth of the Philippines. After a conference and upon request of Warden Atienza, Atty. Valencia prepared Exhibit 4, with carbon copies, and handed them to Warden Atienza. The latter took over the typewritten document to the PCAU authorities, and delivered it as his personal statement on the case; he swore to it on the same day before George R. Anderson, 1st Lt., CAC, U. S. Army. Said Exhibit 4 reads as follows:

"AFFIDAVIT

City of Calapan
Province of Mindoro

I, Anacleto Atienza, residing at Calapan, Mindoro, having been duly sworn, do affirm and declare that:

At about 11 in the morning of 29 March 1945, I arrived at the guardhouse of the provincial jail to inspect the jail and deliver the blank form for the subsistence of the prisoners to Mr. Glicerio Lasa, sergeant of the guards; that immediately after entering the guardhouse, Ruel Beloncio and Juan Beloncio, both prisoners under my custody entered and in a loud tone Ruel Beloncio said: "Warden, we like to go out." I replied that they should wait as the guards were yet taking their lunch, but Ruel insisted and again said: "We want to go out, we are not prisoners"; then Juan Beloncio joined him and said: "We are officers"; then again Juan Beloncio said to me: "We are both men, you better take off your uniform and we will fight." I replied that I cannot fight as I regard him as God; then Ruel Beloncio advanced towards me, while Juan Beloncio tried to get one of the rifles which were behind Mr. Lasa, saying: "I am going to kill you all"; then at this instant, Ruel Beloncio began to wrestle my revolver which I had in my pocket. I tried hard to prevent him from taking possession of my firearm and when I felt

I would be overpowered, I cried to Mr. Lasa to shoot Ruel and at that instant, while Ruel Beloncio was trying to wrestle the revolver from me, Mr. Lasa fired once, hitting Ruel. Juan Beloncio started to run outside the jail to escape and Mr. Lasa pursued him.

That as evidence of the fact that Ruel wrestled hard to get possession of my revolver, the side of my pocket wherein I placed my revolver at that time was torn down and if it were not for the timely intervention and help of Mr. Lasa, Ruel Beloncio might have taken my revolver.

In testimony whereof, I have hereunto set my name below, this 29th of March, 1945, at Calapan, Mindoro.

(Sgd.) ANACLETO ATIENZA

Subscribed and sworn to before me this 29th day of March 1945.

(Sgd.) GEORGE R. ANDERSON
1st. Lt., CAC O–317957

HQ. 24th CIC DETACHMENT (24th INF. DIV.)
CALAPAN, MINDORO

CERTIFICATION

I hereby certify that the above affidavit is a true and correct copy of the original which I have forwarded to the Commanding Officer 24th CIC Det., 24th Infantry Division APO 24.

Given this 3rd day of April, 1945, Calapan Mindoro.

(Sgd.) ROBERT L. CLAXTON
Special agent, CIC

Ruel Beloncio was taken to the Provincial Hospital of Mindoro, but notwithstanding the medical assistance, he died the day following as a result of the wound inflicted by the appellants. The necropsy report discloses that the bullet entered the middle portion below the left clavicle of the deceased. After entering the left pleural cavity, it passed through the upper lobe of the left lung, causing severe hemorrhage, piercing the mediastinum and the left lateral side of the fourth thoracic vertebra. The bullet went through the body and its exit was located in the midline, posterior, at the level of the fourth thoracic vertebra. In other words, the trajectory was downwards, slightly from left to right.

When the original informations were filed before the justice of the peace of Calapan, Mindoro, Warden Atienza was included as a co-accused of Sergeant Lasa, but through the successful efforts of their common counsel his name was dropped from the cases after the preliminary investigation conducted before the summary court.

The witnesses for the prosecution are Lucia Kalayaan-Acevedo Beloncio (Mrs. Juan Beloncio), Juan Beloncio, brother of the deceased, Mary Concepcion-Bautista, private prosecutor, Triunfo N. Bangog, director of the Provincial Hospital of Mindoro, and Reynaldo Onal, guard of the provincial jail, while the witnesses for the defense were Lt. Pedro R. Navarro, former guerrilla comrade of the deceased

and executive officer of the guerrilla unit under the command of Esteban Beloncio, Abelardo Patolan, another guard of the provincial jail, Augusto Valencia, justice of the peace for Pinamalayan and Sungabong, Mindoro, and one of the attorneys for the defense, and Glicerio Lasa, the accused himself. The prosecution introduced Warden Atienza as a rebuttal witness.

Appellant admits that the shot fired by him with the Garand rifle caused the death of Ruel Beloncio. He claims, however, exemption from criminal responsibility, as he acted in defense of his superior officer, the provincial warden, who was unlawfully attacked by the deceased. (Art. 11, par. 3, R. P. C.)

For an accused to invoke this justifying circumstance successfully, he must show by clear and convincing evidence the exculpatory facts relied upon by him. (People *vs.* Berio, 33 Off. Gaz., 5.) There are three essential requisites, namely: First, unlawful aggression; second, reasonable necessity of the means employed to prevent or repel it; third, that the person defending be not induced by revenge, resentment, or other evil motives.

The trial court affirmed accurately that it is "a *truism* that the deceased Ruel Beloncio and Juan Beloncio were the aggressors." There could have been no other plausible conclusion, considering the conduct of the Beloncio brothers previous to the shooting. The accelerated volley of sarcastic and threatening remarks from Ruel and Juan Beloncio, and their lawyer, Atty. Bautista, with Warden Atienza on the receiving and defensive end, the unexpected and swift movements of Juan Beloncio of rushing into the guardhouse, pushing the warden and dashing towards the accused in an attempt to get possession of one of the Japanese rifles leaning against the wall behind Sergeant Lasa, grabbing and crumpling the papers in front of Sergeant Lasa, flinging them at the latter's face, and his threats to kill them all, as he was running out from the guardhouse, and the simultaneous attempt of Ruel to snatch the revolver of Warden Atienza, constitute unlawful aggression.

At this crucial moment, Sergeant Lasa took the Garand rifle from its leaning position in the near wall, and hearing Warden Atienza shouting an order for him to "shoot, shoot," as he noticed visibly that he was losing his grip against the superior strength and bigger build of Ruel Beloncio, Sergeant Lasa fired his rifle, thus ending the struggle for the possession of the revolver.

The belief of an accused that an attack was forthcoming, in view of the threatening and hostile attitude of the deceased, coupled with an actual external act of aggression, satisfies the essential element of unlawful aggression justifying self-defense, or defense of strangers. (U. S. *vs.*

Carrero, 9 Phil., 544, citing decisions of the Supreme Court of Spain, dated 30 October 1884; 19 March 1885, 31 October 1889, and 15 November 1889; see also Spanish Supreme Court decisions of 26 June 1691, 46 Jur. Crim. 863; 24 Oct. 1895, 55 Jur. Crim. 169; 11 Dec. 1896, 57 Jur. Crim. 397; 29 Sept. 1905, 75 Jur. Crim. 131; 7 March 1921, 106 Jur. Crim. 178.) And, during an unlawful aggression in the course of the fight and as soon as there is danger to the life or limb of the one assaulted, the latter is entitled to repel the danger, to evade the advance, and, if necessary, render him powerless. The ancient common-law rule in homicide known as "retreat to the wall" has given way to "stand ground when in the right." If the victim is where he is entitled to be, he is not expected to step aside when his assassin is rapidly advancing with a deadly weapon. (Baird *vs.* U. S., 158 U. S. 550; U. S. *vs.* Dowen, 37 Phil., 57.)

Our Supreme Court has set down a doctrine, even more humanitarian, for peace officers. A police officer in the performance of his duty must stand his ground and cannot take refuge in flight when attacked. His duty is to overcome his opponent and the degree of violence that he may exert differs somewhat from that which a private citizen may offer in self-defense. Hence, if a police officer is in the performance of his duty to quell a disturbance in the public street and is attacked by the deceased, who is armed with a knife and causing the aggression, and discharges the revolver against the assailant and fatally wounds him, the police officer should be exempted from criminal liability because the force employed by him under the circumstances is reasonably necessary in the exercise of a legitimate self-defense (U. S. *vs.* Mojica, 42 Phil., 784).

The herein accused had personal knowledge of the notoriety of the detention prisoners, the Beloncio brothers, as "men-killers"; he was an eye-witness to an incident of the Japanese occupation, during which Ruel Beloncio killed a person, and for which said Ruel was charged subsequently with murder; he was informed and alerted for the jailbreak scheme of the Beloncio brothers, possibly including the other detention prisoners and jailmates, who belonged also to their disbanded guerrilla unit. Juan's rushing attempt of grabbing a rifle leaning behind the accused, associated with the simultaneity of Ruel's move to wrest the revolver from Warden Atienza, in which the former had a visible edge due to his better physical build and superior strength, were vivid realities in the mind of the accused when he heard Warden Atienza shouting the order "shoot, shoot". The danger, had Ruel succeeded in getting possession of the revolver, was not against the life of Warden Atienza alone

but also of those of the accused and his other companions in the guardhouse.

The reasonable necessity of the means employed in the defense is not subordinate to the existence of the injury done but to the imminence and danger of the injury itself. (U. S. *vs.* Paras, 9 Phil., 367, citing decision of Spain, dated 22 Dec. 1887.) Applying this principle, it was held that if a person enters the dwelling of another and attacks one of the inmates thereof, the latter is justified in defending himself with such weapons as are at hand, and if from the defense the aggressor dies, it is attributable to his own wrongful act. (U. S. *vs.* Brella, 9 Phil., 424.)

It has been argued that it was not indispensable for the accused to have fired his rifle, for he might have clubbed Ruel instead, either with its butt or its barrel, as the distance was four meters scarcely from each other. The accused, familiar as he was with the use of small arms, knew fully well that it would have been a matter of a split second for Ruel, an expert in the handling of firearms, to have shot both Warden Atienza and the accused, once he had possession of the revolver. One who is assaulted cannot have sufficient tranquillity of mind to think, to calculate, and to make comparisons, which can be easily made in the calmness of his home. It is not the indispensable need but the reasonable necessity which the law requires; it is essential in each specific case to determine the relative necessity, whether it is more or less imperative, in accordance with the sound rules of logic.

Conformably with these underlying principles, it was held that in view of the probability that the deceased, because of his superior strength, would get control of the pistol and the probability that in such eventuality he would use it against the defendant, the discharge of the pistol by the latter was a justifiable act of self-defense. (People *vs.* Lara, 48 Phil., 153.)

All circumstances considered, the appellant had no other rational recourse except to fire the rifle, if he had to repel the unjustified assault against his superior officer, the warden, from the detention prisoner legally committed to his custody. Certainly, no normal individual and much less an officer of the law, placed in a situation as critical as that of the appellant, who wants to avoid an unprovoked danger menacing not only his superior officer but also his own life, can be required sufficient coolness to choose other means of defense. (Decision, Supreme Court of Spain, 4 July 1887, 59 Jur. Crim., 498.)

Even the trial court had to admit that the challenge and open defiance of the Beloncio brothers against the warden's authority, closely related with the familiarity of the appel-

lant with their unusual toughness and aggressiveness of character and his knowledge of their scheme for escape or some other kind of subversive move, have caused necessarily both nervousness and fear in the appellant; so overwhelming it was that it compelled him to act as he did in the instant case "when he promptly decided to repel the aggression by firing a shot at Ruel Beloncio."

Following the *ratio decidendi* in the case of U. S. *vs.* Molina, 19 Phil., 227, and People *vs.* Sumicad, 56 Phil., 643, it would have been suicidal for the appellant to withhold action until Ruel Beloncio had actually succeeded in wresting the possession of the revolver from Warden Atienza.

Atienza and Lasa were warden and sergeant of the guards, respectively, of the provincial jail of Mindoro. They were both where they had a right to be, namely, in the guardhouse and inside the premises of the provincial jail. Neither of them provoked the assault and the on-rush that came from the detention prisoners that were under their custody. Had they retreated or allowed them to run away after they had been informed of their preconceived plans of escape, they would have been not only recreant to their duties but would have been subject to a possible criminal prosecution (arts. 223, 225, Revised Penal Code). Moreover, a person who acts in the fulfilment of a duty or in the lawful exercise of a right or office does not incur any criminal liability [art. 11 (5)], Revised Penal Code; Cf. People *vs.* Delima, 46 Phil., 738).

As to the third and last requisite essential to justify the defense of a stranger—"that the person defending be not induced by revenge, resentment, or other evil motives,"—we have the finding of the trial court that it is an undisputed fact that the appellant and the deceased Ruel Beloncio "never had any grudge or ill-feeling" prior to the incident in question. Even Juan Beloncio himself admitted that he and his deceased brother "had no bad relation whatsoever with the appellant" and "that on the contrary my brother and I used to give them (Warden Atienza and Sergeant Lasa) anything we could, like coffee, oranges and cigarettes." The appellant and the deceased were not only town-mates (of Naujan, Mindoro) but were "intimate friends." Quoting from the trial court, the following is definitely supported by the evidence:

> "At any rate there is no doubt that the accused, Glicerio Lasa, would not dare to shoot at Ruel Beloncio without any motive or reason because it is an undisputed fact admitted by the prosecution and likewise by the defense that they never had any grudge or ill-feeling prior to the occurrence. It is also an uncontroverted fact that the accused Lasa did not take part in that lively and heated verbal altercation which was the main source of this trouble."

The appellant has fully established, therefore, that he acted in the defense of a stranger, within the terms and meaning of the Revised Penal Code.

The prosecution contends, however, that its evidence has quantitative as well as qualitative superiority over that of the defense. The prosecution presented four alleged eyewitnesses, who testified not only on the alleged murder of Ruel but also on the frustrated murder of Juan Beloncio, which was dismissed by the court *a quo*.

Reynaldo Onal testified that he had no knowledge that Ruel Beloncio attempted to grab the revolver from Warden Atienza, but he admitted on cross-examination that when he saw the appellant with the Garand rifle he was so "frightened" that he immediately and instinctively "dropped" on the floor of the guardhouse with his attention directed at the appellant, and that "almost simultaneously" he "heard the first shot." He added that "immediately before the first shot was fired" all he could hear "was commotion on the door of the guardhouse." An examination of the whole evidence elicits that the only possible incident that could have caused any disturbance or perturbation concurrent almost with the first shot was the struggle between Ruel Beloncio and Warden Atienza for the possession of the latter's revolver.

Lucia Kalayaan-Acevedo and Juan Beloncio, being sister-in-law and brother respectively of the deceased, Ruel Beloncio, have all the reasons to describe a biased picture of the incident. Juan Beloncio, husband of Lucia, considered himself an offended party, at least in the frustrated murder case, that was being tried jointly.

Attorney Bautista was the lawyer for Ruel Beloncio not only prior to the incident but also during the trial, having questioned the witnesses as a private prosecutor. Under normal conditions her testimony should undoubtedly carry more weight than that of the others, considering that as a lawyer and as an officer of the court, she has theoretically the sole duty of helping the court in the administration of justice. Presumably, her duties as former counsel for the deceased and as private prosecutor were merely to defend and protect the rights of her clients but never to promote their interests and distort the facts to the prejudice of an innocent person. To avoid such undesirable situations, Canon 19 of the Code of Legal Ethics has provided for some salutory rules; although the law does not forbid an attorney to be a witness and at the same time be an attorney in a cause, the courts prefer that counsel should not testify as a witness and at the same time be an attorney in a case (National Bank *vs.* Uy Teng Piao, 57 Phil., 337, 342). There is enough reason to believe, however, that she had the best of intentions of being fair, as far

as possible, because she is practically the only witness who gave us the clue as to the real origin and cause of the dispute between Warden Atienza and the Beloncio brothers, that resulted ultimately in the death of Ruel Beloncio. She related that after Warden Atienza had arrived and she had greeted the latter, she asked the warden: "Can you give us a guard for Ruel and Juan Beloncio to go out and see Attorney Hernandez?," to which the warden answered: "Why cannot Attorney Hernandez come here to confer with them?", although he added, "Well, they can go out, provided they would not stay long outside." It was then that Ruel Beloncio intervened, and asked the warden: "Why, what do you think of us, Mr. Warden?—We are good people * * *" (t. s. n. p. 59). But her apparent impartiality and well-intended fairmindedness gave way and collapsed when, on her cross-examination, she admitted that her interests for the guerrilla organization, to which the Beloncio brothers and their father belonged, had absorbed her so completely, that although she knew that Capt. Esteban Beloncio, father of Ruel and commanding officer of one of the guerrilla units, was wanted by the police authorities of Mindoro on a warrant of arrest that was issued on the day after he was released on habeas corpus, she suffered him to stay in the same place where she was living, and kept him in hiding until he had the chance of escaping for Panay (t. s. n., pp. 67, 68). She learned of the issuance of this warrant of arrest, but knowing her own mind, she chose to sacrifice the cause of law and order, extending a protective mantel to a fugitive from justice. While on the witness stand, Attorney Bautista was placed on a test: "And as a lawyer as you are, you know that a warrant of arrest duly issued by the Courts of Justice is valid?"; the prosecuting attorney interposed an objection, arguing suggestively as ground that it called for an incriminating answer, and upon a court ruling that she could answer if she wanted to, she smothered her chance to extricate herself and merely said: "I refuse to answer that question." (t. s. n., pp. 68–69). Our courts of justice cannot give any credence to a witness who despite her legal training had admitted to have abetted knowingly in defeating justice. An effusive defense does not remit an affront.

The testimony of Warden Atienza merits no credibility either, for it is packed with self-contradictions and incongruences on most material and vital facts, instances of which are very few in the judicial annals, considering his official position and corresponding degree of instruction. After admitting categorically in open court, not only once but in three successive answers, that "Ruel Beloncio was grabbing the revolver from me" when he was shot by the accused,—a natural reaction perhaps of his subconscious

mind,—he made vain attempts to reverse himself in heroic but foolish efforts of saving belatedly the face of the prosecution, which introduced him as a rebuttal witness, involving himself so miserably and inextricably that the trial court has to instruct the provincial fiscal to investigate the conduct of Warden Atienza for possible charges of perjury. We concur in these instructions, but we endorse the investigation to the Department of Justice, to find out the possible suborner who induced this witness to take the stand in rebuttal for the prosecution. There seems to be more than a simple and isolated case of subornation of perjury, because an officer of the law had been unadvisedly prosecuted, making him suffer all the pangs of a trial for his life, when his acts were within and in the course of the performance of his official duties. A proper, just, careful and impartial investigation would have amply set him free at the very outset of these proceedings. Officers of the law should be afforded a better protection and accorded a better treatment when in the performance of their duties and obligations, they have maintained and upheld with dignity, sound discretion and courage the majesty of the law. Any other vacillating policy adopted on the part of the proper authorities will merely add chaos to confusion, and our Government will never be in a position to develop and maintain loyalty to duty nor to expect a courageous and upright performance from our peace officers. The payment of their back salaries during the pendency of their cases in court can never compensate for the calvary that they had undergone.

The least that the Government could do for the appellant is to pay him his salary from the time he was suspended from office and restore him immediately to his former post, if he has the necessary qualifications to continue in the service.

All premises considered, we hold that the appellant has established with abundant, clear, convincing, and conclusive evidence the essential elements required in the defense of a stranger and that he acted in the fulfilment of an official duty, and as these constitute two justifying circumstances that exempt him from criminal responsibility for the death of Ruel Beloncio, he is hereby acquitted from the charges; his immediate release is ordered, and the sentence of the trial court is reversed, with costs de officio. He must be restored in the service, unless he is disqualified, and his salaries from the time he was suspended must be paid in accordance with the pertinent legal provisions.

It is so ordered.

Jugo and *De la Rosa, JJ.*, concur.

Judgment reversed.

[No. 196–R. March 28, 1947]

CELESTINA GALATICA ET AL., plaintiffs and appellants, *vs.* APOLONIA GALATICA ET AL., defendants and appellees

1. PLEADING AND PRACTICE; ANSWER; DATE OF MAILING REGARDED AS DATE OF FILING AND ANSWER.—The date when the answer was mailed should be regarded as the date of the filing of said pleading (Rule 27, section 1, Rules of Court).
2. ID.; COURT'S DISCRETION TO EXTEND TIME TO PLEAD.—Courts have discretion to extend the time to plead (Rule 15, section 16, Rules of Court; Unson *vs.* Abrera, 14 Phil., 146, 150).
3. OWNERSHIP; POSSESSION; PRESCRIPTION; TITLE ACQUIRED BY PRESCRIPTION.—Having been in possession of the land in question under claim of exclusive ownership, openly, publicly and continuously for approximately 24 years, the defendants have acquired title to it by prescription.
4. PLEADING AND PRACTICE; JUDGMENTS; POWER OF APPELLATE COURT TO REVIEW PROVISION OF DECISION NOT TOUCHED BY THE PARTIES; DAMAGES NOT ALLOWED.—There being no finding—and the evidence being insufficient to hold—that this action has been instituted maliciously or without reasonable cause, the provision in the decision appealed from awarding damages for expenses incurred in connection with this litigation is erroneous (36 C. J., 420) and may be reveiwed by this Court, pursuant to Rule 53, section 5, of the Rules of Court, although not touched upon either in the briefs or during the oral argument.

APPEAL from a judgment of the Court of First Instance of Bulacan. Buenaventura, J.

The facts are stated in the opinion of the court.

Martiniano O. de la Cruz for appellants.
Rosendo J. Tansinsin for appellees.

CONCEPCION, *J.:*

On September 14, 1944, Celestina, Victoria and Angela Galatica instituted this case against Apolonia, Dominga and Liwanag Galatica in the Court of First Instance of Bulacan. In the complaint it is alleged that in the year 1909 one Potenciano Laguna died in Meycauayan, Bulacan, leaving therein a small parcel of land more particularly described in the complaint; that plaintiffs and defendants are the grandchildren and heirs of said deceased; that plaintiffs are entitled to one-half of said property and the defendants to the other half thereof; that Potenciano Laguna died intestate and his estate has not been judicially settled; that said estate has no debts; and that the defendants have failed and refused to deliver plaintiffs' share in the aforementioned property. The prayer is that one-half thereof be awarded to the plaintiffs.

Defendants admitted some allegations and denied other allegations of the complaint and alleged as special defense that on November 9, 1920, plaintiffs' mother, Aniceta Laguna, sold her share in the property in question to her

sister, Rufina Laguna, who is defendants' deceased mother, and that since then defendants have been in adverse possession thereof publicly, openly and continuously, as its owners, with the knowledge and consent of the plaintiffs and their predecessors in interest. A copy of the deed of sale was attached to the answer as Annex 1.

After due trial the lower court dismissed the complaint and sentenced the plaintiffs to pay jointly and severally to the defendants the sum of ₱500 as damages for the unjustified institution of this case, as well as the costs. Plaintiffs have appealed from this decision, but after the approval of the record on appeal and before the same was forwarded to the appellate court, a statement dated March 25, 1946, purporting to be signed and thumbmarked by plaintiffs Victoria and Angela Galatica, respectively, was atttached to the record in the Court of First Instance. These parties stated therein that they have no interest in the property in question because they know that the same was sold by their mother, with the consent of their father, who is still alive; that they have never engaged the services of the counsel who prosecuted the present action, which they believe unfounded; and that they are not interested in the appeal. Hence, the only appellant now is plaintiff Celestina Galatica.

At the outset, it is urged that the lower court erred in entertaining appellees' answer and allowing them to defend themselves and introduce evidence on their behalf, notwithstanding the fact that said answer was received by the clerk of court on October 6, 1944, or more than 15 days after service of summons, which took place on September 16, 1944. There is no merit in this contention, it appearing that the answer was mailed on October 1, 1944, which should be regarded, therefore, as the date of the filing of said pleading. (Rule 27, section 1, Rules of Court.) Furthermore, courts have discretion to extend the time to plead. (Rule 15, section 16, Rules of Court; Unson *vs.* Abrera, 14 Phil., 146, 150.)

The sufficiency of the evidence on the alleged sale by appellant's mother in favor of that of the appellees is assailed in the second assignment of error. Admittedly, the property in question originally belonged to the deceased Potenciano Laguna, who was survived by two daughters; namely, Aniceta and Rufina Laguna, who married the brothers Tomas and Roman Galatica, respectively.

Appellees contend that on November 9, 1920, a few hours before Aniceta Laguna died of broncho-pneumonia, she, assisted by her husband Tomas Galatica, sold and conveyed her share in the property in question to Roman Galatica and Rufina Laguna Galatica, in consideration of

the sum of ₱30 then paid by these spouses. In support of this pretense, appellees introduced Exhibit 1, a private instrument, in Tagalog, reciting the foregoing facts and bearing at the foot thereof the names of Tomas Galatica and Aniceta Laguna, under which appear what purport to be their thumbmarks. Appellant questions the validity of this instrument upon the ground that Aniceta Laguna knows how to read and write and that her failure to sign on Exhibit 1 and her thumbmark at the foot thereof indicate that the instrument must have been made after her death.

Testifying for the defense, Roman Galatica declared, however, that Exhibit 1 was thumbmarked by Tomas Galatica and Aniceta Laguna several hours before her death on November 9, 1920, and that the latter did not sign thereon because she was too weak to do so. This evidence is uncontradicted, despite the fact that appellant's father, Tomas Galatica, is still alive and could have refuted, therefore, the aforesaid testimony of Tomas Galatica, if the same were false. On the contrary, on March 23, 1933, Tomas Galatica made an affidavit (Exhibit 2) confirming Exhibit 1. Hence, said testimony of Roman Galatica must be true.

At any rate, since November 9, 1920, the property in question was held by Roman Galatica and his wife Rufina Laguna as owners thereof and upon the latter's death the possession passed to their children, the defendants herein. In fact, it appears that on March 25, 1924, the corresponding declaration for purposes of taxation, in the name of Potenciano Laguna, was cancelled upon the request of Rufina Laguna, who then caused the property to be assessed in her name. These acts and the deed of conveyance (Exhibit 1) secured from Tomas Galatica and Aniceta Laguna, show the intent of Roman Galatica and Rufina Laguna to assert exclusive ownership thereon and that they held it under such claim. Having been in such possession openly, publicly and continuously from November 9, 1920 to the institution of this case on September 14, 1944 or for approximately 24 years, it is clear that appellees have acquired title to the property in question by prescription.

After the rendition of the decision appealed from, plaintiff-appellant moved for the reopening of the case with a view to introducing the testimony of one Tiburcio Veldibas, who, in an affidavit attached to the motion, stated that on November 9, 1920, between 8 and 9 o'clock a. m., he reported to the municipal secretary of Meycauayan that Aniceta Laguna had died on that date, between 4 and 5

o'clock a. m. The order of the lower court denying this motion for reopening is branded by the appellant as erroneous, but we do not agree with this view. As already stated, the appellees have held the property in question under conditions vesting in them title thereto by prescription. The testimony of Veldibas could not change, therefore, the result of the case.

The Court notes that His Honor, the trial Judge, sentenced the plaintiffs to pay to the appellees herein the sum of ₱500 by way of damages, for expenses incurred in connection with this litigation. There being no finding—and the evidence being insufficient to hold—that this action has been instituted maliciously or without reasonable cause, said provision in the decision appealed from is erroneous. (38 C. J. 420.) The same may be reviewed by this Court, pursuant to Rule 53, section 5, of the Rules of Court, although not touched upon either in the briefs or during the oral argument.

With the elimination of said award for damages, the decision appealed from is hereby affirmed, in all other respects, without special pronouncement as to costs.

It is so ordered.

Montemayor, Pres., J. and *Labrador, J.*, concur.

Judgment modified.

[No. 277–R. March 28, 1947]

ANA B. VDA. DE SYTA, plaintiff and appellant, *vs.* AUGUSTO PEÑA, defendant and appellee

LEASE; COMMONWEALTH ACT NO. 689, RETROACTIVE.—Although Commonwealth Act No. 689, as amended by Act No. 66 of the Republic, is not a penal statute and strictly speaking should not be given retroactive effect, yet considering its plain purpose, which is no other than to remedy the situation created by the acute scarcity of dwelling houses resulting from the wholesale destruction of private residences in Manila, and in order to curb "the speculation on rents of buildings destined for dwelling purposes," it seems that the action of the lower court in applying said Act to this case is justified. In Laurel *vs.* Misa (42 Off. Gaz., 2847, 2851), the Supreme Court held that "there is no constitutional objection to retroactive statutes where they relate to remedies and procedure." (See also 16 C. J. S. p. 865, *et seq.*)

APPEAL from a judgment of the Court of First Instance of Manila. Jugo, J.

The facts are stated in the opinion of the court.

De los Santos & Suba for appellant.

Pio Joven for appellee.

TORRES, *J.:*

The above-named plaintiff is the owner of a building, consisting of four *accesorias* or tenements, located at No. 35 Cruzada street, Quiapo, Manila. Since October, 1941, the defendant had been occupying one of said *accesorias* at a monthly rental of ₱30, payable in advance, within the first five days of each month. On May 5, 1945, the plaintiff advised the defendant that, effective from June 1, 1945, the monthly rental would be raised from ₱30 to ₱35. In view of the defendant's refusal, the plaintiff requested the defendant to vacate the premises occupied by him and, subsequently, on July 18, 1945, filed with the Municipal Court of Manila the corresponding complaint whereby he prayed that said defendant be ordered to pay the sum of ₱35 monthly, with legal interest from the date of the filing of said complaint, and every month thereafter, in addition to ₱100 as damages, and to vacate the premises at No. 35 Cruzada street, with costs.

Answering the complaint, defendant alleged that he had never failed to pay the monthly rent of ₱30 and is paying the increased amount of ₱35 in compliance with the judgment rendered against him by the Municipal Court. He, however, contends that the pre-war rent of the premises occupied by him was ₱30 only, and that he and his family, on account of the acute scarcity of houses in Manila, could not move to another place.

After proper hearing, the Court of First Instance of Manila reversed the judgment rendered for the plaintiff by the Municipal Court of Manila and, being of the opinion that the plaintiff was not justified in increasing the amount of the rental, for the occupancy by the defendant of the premises in question, from ₱30 to ₱35 from the date of the enactment of Commonwealth Act No. 689, by its judgment of April 16, 1946 ordered the defendant to pay the plaintiff the sum of ₱30 for the monthly rental of said premises, including the previous months and denied the other petitions contained in the complaint, without pronouncement as to costs.

The only controversy between plaintiff and defendant in this case is whether or not the latter should be made to vacate the *accesoria* or tenement occupied by him at No. 35 Cruzada street, Quiapo, Manila, because he did not comply with the demand of plaintiff to pay for the occupancy thereof the sum of ₱35 beginning from the month of June, 1945. The record shows that said house No. 35 Cruzada street, Quiapo, Manila, owned by this plaintiff is assessed at ₱4,800 (Exhibit 1) and that said

house consists of four *accesorias* or tenements, one of which is leased to this defendant. During the pendency of this litigation, Commonwealth Act No. 689 was enacted on October 25, 1945, and inasmuch as its section 3 provides that * * * the said rents shall be presumed unjust and unreasonable if they exceed twenty percentum of the annual assessment value of the building and the lot on which it is erected * * *," it appears that 20 per cent of ₱1,200, which is the proportionate value of one of the four *accesorias* leased by defendant-appellee, would be ₱240. One-twelfth of this amount is ₱20, which is 20 per cent of the annual assessed value of said premises. It clearly results, therefore, that if ₱30 is more than 20 per cent of the assessed value of the premises in question as provided by said Section 3 of Commonwealth Act No. 689, it stands to reason that the increased monthly rental of ₱35 demanded by plaintiff-appellant is even much greater than the amount allowed by section 3 of said Act. It appears, however, that defendant-appellee is willing to continue paying to plaintiff the monthly rental of ₱30.

The record does now disclose that defendant-appellee had invoked in this litigation the benefits of Commonwealth Act No. 689 which, as already stated, became effective when this case was already submitted for disposition, but before the rendition of the judgment of the Court of First Instance of Manila. Although Commonwealth Act No. 689 is not a penal statute and strictly speaking should not be given retroactive effect, yet considering its plain purpose, which is no other than to remedy the situation created by the acute scarcity of dwelling houses resulting from the wholesale destruction of private residences in Manila, and in order to curb "the speculation on rents of buildings destined for dwelling purposes", it seems that the action of the lower court in the premises is justified. In Laurel *vs.* Misa (42 Off. Gaz., 2847, 2851), the Supreme Court held that "there is no constitutional objection to retroactive statutes where they relate to remedies and procedure." (See also C. J. S., p. 865, *et seq.*)

For these reasons, this Court, confirming the action of the lower court, believes that said legislation, which was later amended by Act No. 66 of the Republic, is applicable to this litigation.

In view of all the foregoing, and finding no error in the judgment appealed from, the same is hereby affirmed, with costs against the appellant.

Endencia and *Felix, JJ.*, concur.

Judgment affirmed.

[No. 321-R (L-805). Marzo 29, 1947]

EL PUEBLO DE FILIPINAS, querellante y apelado, *contra* GORGONIO ORBETA, acusado y apelante

DERECHO PENAL; CAUSAS CRIMINALES POR IMPRUDENCIA TEMERARIA; NEGLIGENCIA CONTRIBUTIVA COMO DEFENSA NO CABE EN LAS CAUSAS CRIMINALES POR IMPRUDENCIA TEMERARIA.—La defensa de negligencia contributiva no cabe en las causas criminales por imprudencia temeraria, pues uno no puede alegar la negligencia de otro para evadir los efectos de su propia negligencia.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Bulacán. Buenaventura, J.

Los hechos aparecen relacionados en la decisión del tribunal.

D. José Topacio Nueno y *D. Salvador C. Reyes* en representación de los apelantes.

El procurador general auxiliar S. Alvendia y *el procurador Torres* en representación del apelado.

GUTIERREZ DAVID, *M.:*

En la mañana del 22 de diciembre de 1945, el automóvil Chevrolet No. 676 de la propiedad del ofendido Ricardo Gerónimo, guiado por Guillermo Agloba, procedente de Peñaranda, Nueva Écija, iba en dirección a Manila. Al llegar a cierta parte del camino nacional en el barrio de Malinta, Polo, Bulacán, el chófer del citado automóvil vió que un jitney venía en dirección opuesta, seguido de un camión (6 x 6), que resultó ser el guiado por el procesado Gorgonio Orbeta. En aquel momento, el camión trató de pasar al jitney que iba delante, por lo que el chófer del Chevrolet amainó la marcha de su coche. El camión aceleró la suya para pasar el jitney y rozó con el jitney que, por el golpe, fué tirado a una zanja; y acto seguido chocó contra el automóvil Chevrolet. De resultas de esta colisión el auto quedó totalmente destrovado. El camión después de chocar el auto, cayó también en la zanja. A raíz del golpe producido por el choque, Agloba, que guiaba el auto, perdió el conocimiento y recibió una laceración debajo de la ceja izquierda. Fué llevado sin sentido al Hospital General de Manila donde, más tarde, recobró el conocimiento y fué dado de alta. El automóvil destrozado es del modelo de 1939, y lo compró el ofendido en 29 de octubre de 1945 de Fortunata Bordador por la suma de ₱7,000 (Exhibit B).

Hecha la investigación del caso por la policía militar, uno de los miembros de dicho cuerpo, Benjamin Suarez, presentó al informe, Exhibit A, donde hace una descripción del accidente que coincide con la que se ha dado por el chófer Agloba.

Por los hechos, acabados de mencionar, que las pruebas de la acusación han establecido, el Juzgado de Primera Instancia de Bulacán halló al procesado Gorgonio Orbeta culpable del delito de daños a la propiedad por imprudencia temeraria, y le condenó a pagar una multa de ₱7,000, con prisión subsidiaria en caso de insolvencia, a indemnizar al ofendido Ricardo Gerónimo en la suma de ₱7,000 y a pagar las costas. No conforme con tal decisión, el procesado apeló para ante esta instancia, alegando que el Juzgado inferior erró al haberle hallado culpable del delito querellado y condenado a la pena ya mencionada y al no haber declarado al chófer del auto Chevrolet culpable de negligencia contributiva.

La defensa contiende que el accidente ocurrió del modo siguiente: El Chevrolet estaba tratando de pasar una carretela que iba delante y el chófer, al ver que no lo podía pasar, de repente frenó su auto por lo que éste patinó y chocó contra el camión, guiado por el procesado, tirándole al canal; y que el jitney, que seguía detrás, hubo de arrojarse al canal para no chocar con el camión.

El Juzgado inferior no halló meritoria tal defensa. Tampoco la encontramos así. El informe de la policía militar no habla ni de la carretela que el automóvil supuestamente trató de pasar ni del hecho de que éste haya patinado. Dicho informe y el testimonio del policía Suarez corroboran la versión dada por el chófer del automóvil sobre el percance. El citado informe se ha basado, además, en las informaciones dadas por algunos circunstantes y se ha preparado inmediatamente después del accidente, es decir, cuando, como es de suponer, no habían desaparecido todavía las huellas dejadas por los tres vehículos. Por lo demás, las relativas posiciones del camión (Exhibit A–3), del jitney (Exhibit A–1) y del automóvil (Exhibit A–2), antes y después del accidente, tal como están representadas en el croquis Exhibit A, preparado por el policía, y el hecho de que la parte frontera y el lado derecho del auto (Exhibit D) son los que quedaron destrozados, confirman la teoría de la acusación.

La versión de la defensa no está de acuerdo con las probabilidades del caso ni es lógica. Si fuera cierto que el chófer del auto frenó de repente su coche al ver que no podía alcanzar y pasar la carretela y que por haber frenado así el coche patinó y dió contra el camión, no se explica porqué dicho camión, que era de 2½ toneladas (6 x 6) y mucho más grande y pesado que el automóvil, hubo de ser tirado al canal. La caída del camión al canal obedeció indudablemente a que el procesado perdió el control del volante, así que su camión hubo chocado el auto. El hecho de que el camión después de la colisión aún pudo recorrer

cierta distancia antes de caer en la zanja es otro detalle que demuestra que el mismo iba con mucha velocidad.

Por lo dicho hallamos que el choque en este caso obedeció principalmente a que el apelante intentó pasar al jitney a pesar de que sabía que había otros vehículos que venían en dirección opuesta; que ésto lo hizo con un camión grande y pesado y corriendo con mucha velocidad cerca de una curva del camino; y que al hacer así, él no ha tomado las precauciones debidas y medidas necesarias que la prudencia ordinaria aconseja bajo las circunstancias mencionadas. El apelante es, por tanto, culpable de imprudencia temeraria que es la causa inmediata del accidente que se investiga.

La alegada negligencia contributiva de parte del chófer del automóvil no está acreditada. Antes al contrario, se ha demostrado que éste se hallaba en el lado del camino que le correspondía, amainó la marcha de su coche al ver la proximidad de los vehículos que venían en dirección opuesta y hasta aplicó sus frenos antes de ocurrir el accidente. Por lo demás, la defensa de negligencia contributiva no cabe en las causas criminales por imprudencia temeraria, pues uno no puede alegar la negligencia de otro para evadir los efectos de su propia negligencia.

Tomando por base el precio de ₱7,000 por el que el ofendido adquirió el auto destrozado, el Juzgado inferior condenó al apelante a pagar una multa de ₱7,000 y a indemnizar a la parte ofendida en la misma suma. Teniendo en cuenta que el ofendido ha estado usando dicho auto por unos dos meses antes del accidente y que éste era de segunda mano y de modelo antiguo; y considerando, además, que la pérdida total del mismo se debió a que el ofendido lo ha abandonado y no se ha tomado la molestía de salvar partes servicibles del mismo, como el motor y demás accesorios, se nos antoja excesivo el valor dado por el Juzgado inferior a los perjuicios causados. Por las razones mencionadas, calculamos y fijamos en ₱5,000 el valor de dichos daños y, por consiguiente, condenamos al apelante a pagar una multa de ₱5,000, con prisión subsidiaria en caso de insolvencia, y a indemnizar al dueño del auto, Ricardo Gerónimo, en la misma suma.

Con la modificación mencionada en cuanto a la pena, confirmamos la sentencia de que se apela, con las costas a cargo del apelante.

La pena impuesta al apelante es la mínima según el párrafo 3.° del artículo 365 del Código Penal Revisado que señala una multa del tanto al triple del importe de los daños causados cuando del acto de imprudencia y negligencia solamente hubieren resultado daños en propiedad ajena. Aplicando rigorosamente las disposiciones del

artículo 29 del mismo Código en que se establece que la pena personal subsidiaria será a razón de un día por cada ₱2.50 y que cuando la pena sea solo multa, la prisión subsidiaria no excederá de seis meses, el castigo impuesto al aquí apelante resulta excesivo, pues, en caso de insolvencia él tendría que sufrir no menos de seis meses de prisión dada la cuantía de la pena pecuniaria impuesta. En dicho caso el autor de una mera culpa criminal sufrirá tanto tiempo, o más, de privación de libertad que los culpables de delitos más graves y que mayor alarma social producen y ésto es indudablemente contrario a los principios cardinales de nuestro sistema represivo. Por estas razones, y de conformidad con las disposiciones del artículo 5 del Código Penal Revisado, recomendamos al Jefe Ejecutivo, por conducto del Departamento de Justicia, que para el caso de que el apelante resulte insolvente, se disponga que la prisión subsidiaria que ha de sufrir no excederá de un mes.

Así se ordena.

A. Reyes y *J. B. L. Reyes, MM.*, están conformes.

Se modifica la sentencia.

[No. 213-R. March 31, 1947]

SIEGFRIED KANDER, plaintiff and appellee, *vs.* REGINO J. DANNUG, defendant and appellant

1. CREDITOR AND DEBTOR; PAYMENTS; APPLICATION OF PAYMENTS; RIGHT OF CHOICE OF DEBTOR IN THE PAYMENT OF HIS DEBTS; ACCEPTANCE OF RECEIPT OF PAYMENT WITHOUT PROTEST, EFFECT OF.—When the debtor accepted without any protest the receipt in which the creditor specified expressly and unmistakably the obligation to which such payment was to be applied, said debtor renounced the right of choice that he enjoyed under the existing laws, and he can no longer contest the application made nor demand now that the payment be applied to another debt (Art. 1172, Civ. Code). Moreover, an unequivocal and unambiguous designation by the debtor is a choice that he cannot change at a subsequent date (Bachrach *vs.* Golingco, 39 Phil., 918).

2. ID.; CONTRACTS; PURCHASE AND SALE OF GOODS; CONTRACT OF PURCHASE AND SALE OF GOODS NEED NOT BE IN WRITING.—A written instrument is not always necessary to perfect a contract of purchase and sale of goods and merchandise, as contracts shall be binding, whatever the form they may have been entered into, provided that the essential conditions required for their validity exist (Art. 1278, Civ. Code). The consent of the contracting parties is implicit in the delivery of the goods and merchandise by the seller and in the acceptance thereof by the buyer; there was a definite object, consisting of the goods and merchandise listed in the invoices; and there was a consideration, indicated by the prices mentioned after each item (Art. 1261, Civ. Code). Not even a memorandum or note duly subscribed by the buyer is required, because he accepted and received the goods (Rule 123, sec. 21 (*d*), Rules of Court).

3. PLEADING AND PRACTICE; PARTIES TO AN ACTION; ACTION BY AN ENEMY ALIEN, NOT BARRED BUT MERELY SUSPENDED DURING WAR.—Judicial action of an enemy alien is not barred absolutely but merely suspended for the duration, and that such suspension is lifted upon the termination of the war.

4. ID.; ID.; INCAPACITY OF PARTY PLAINTIFF TO SUE, A MATTER OF AFFIRMATIVE DEFENSE; PLEA IN CONFESSION AND AVOIDANCE MUST BE SPECIFICALLY PLEADED.—The incapacity of an enemy alien to prosecute his action as a party plaintiff in time of war is a matter of affirmative defense, partaking of the nature of a plea in confession and avoidance (Rule 9, sec. 9, Rules of Court). It must be specifically pleaded, for otherwise it will be deemed waived (Rule 9, sec. 10, Rules of Court; Cf. Maxilon *vs.* Tabotabo, 9 Phil., 390; Society for Propagation of Gospel v. Wheeler, 22 Fed. Cas. No. 13156, 2 Gall. 105; Dorsey v. Thompson, 37 Md. 25; McNair v. Toler, 21 Minn. 175; Heiler v. Goodman's ets., 92 N. J. Law 415, 105 Atl. 233, 3 A. L. R. 336; Burnside v. Matthews, 54 N. Y. 78; Barna v. Cleason etc., 83 W. Va. 216, 98 S. E. 158; Kristel v. Michigan ets. 213 Ill. App. 518).

APPEAL from a judgment of the Court of First Instance of Manila. Felix, J.

The facts are stated in the opinion of the court.

Quijano, Rosete & Tizon for appellant.
Francisco & Jacinto for appellee.

LIM, *J.:*

This is an appeal from a judgment of the Court of First Instance of Manila, dated 14 March 1946, in which the defendant was sentenced to pay to the plaintiffs the sum of ₱1,064.18, with legal interests from 8 December 1944, and costs, and the counterclaim was dismissed.

The records and the stipulation of facts establish that on 16 May 1945 Siegfried Kander, the plaintiff, had sold, conveyed, transferred and delivered to Regino J. Dannug, the defendant, certain items of personal property listed in paragraph 2 of the complaint, consisting mostly of equipment and paraphernalia required in manufacturing and refining vinegar (Exhibit A). The buyer agreed to pay the selling price of ₱6,500, in the manner following:

₱1,000 upon the signing of the contract;
₱1,000 on 31 May 1945;
₱1,500 on 30 June 1945;
₱1,500 on 31 July 1945; and,
₱1,500 on 31 August 1945.

On the first day of trial, the parties agreed:

"Las partes estipulan que el 16 de mayo de 1945 el demandante y demandado celebraron el contrato, cuyo texto es el Exhíbit A;

"Que en virtud de ese contrato se entregaron al demandado todos los efectos mencionados en el párrafo 2 de la demanda;

"Que en virtud de las obligaciones contraídas por el demandado; según el Exhíbit A, el demandado pagó al demandante ₱1,000 en 16 de mayo de 1945; ₱1,000 el 5 de junio de 1945; ₱500 el 7 de julio

de 1945; ₱500 el primero de agosto de 1945; ₱500 el 26 de agosto de 1945; ₱1,000 en 28 de noviembre de 1945; ₱280 el 7 de septiembre de 1945 y ₱320 en 26 de septiembre de 1945.

"Además, el demandante reconoce haber recibido del demandado botellas de vinagre por valor de ₱20.50 que se aplica al pago de las obligaciones del demandado, lo que hace un total de ₱5,120.50 la cantidad que ambas partes reconocen haber recibido por virtud del contrato.

"El demandado se reserva el derecho de presentar otros recibos que demuestran el pago de otras cantidades que, según pretende, deben aplicarse también al pago de su obligación contraída en el Exhíbit A.

El demandado hace constar que el valor de la cantidad de vinagre entregado al demandante no es de ₱20.50, sino ₱85.82."

It has also been admitted by both parties that the defendant made the following payments:

12 October 1945	₱250.00	(Exh. 1)
2 November 1945	250.00	(Exh. 2)
19 November 1945	800.00	(Exh. 3)
Total	₱1300.00	

The defendant, however, denies having received from the plaintiff on 7 June 1945, the merchandise, goods and other miscellaneous property appearing in Invoice Exhibit D, valued at ₱1,050, as well as another batch of goods and articles listed in Invoice Exhibit D-1, priced at ₱305, and allegedly delivered to the defendant on 1 August 1945.

On 8 December 1945 the plaintiff brought this action on the allegation that the defendant, despite repeated demands, has failed and refused and continues to fail and refuse to pay an alleged balance of ₱1,369.18, due on Exhibit A, as well as the interests thereon, from the respective dates of default, in the sum of ₱150, aggregating ₱1,519.18, on the date of the filing of the complaint. The prayer, however, seeks for a judgment for ₱1,529.50, plus legal interests, and costs. Counsel for plaintiff asked during the trial that the amount demanded be corrected and reduced to ₱1,519.18.

The defendant claims in his answer that he has paid in full the agreed purchase price in said Exhibit A, and as counterclaims, he demands that plaintiff be sentenced to pay the following sums: ₱300 for damages caused to defendant's property, ₱130 for storage of certain gas ranges belonging to the plaintiff; and ₱2,000 for damages caused by the registration in the Bureau of Commerce and Industry of the trade-mark ESKA, used in the manufacture of vinegar, which the said plaintiff had sold to the defendant by virtue of Exhibit A, all with legal interests.

In his answer to these counterclaims, the plaintiff denies any liability for the amounts demanded. As it was ad-

mitted during the trial that the first two items of these counterclaims were the subject of litigation in civil case No. 1334 of the Municipal Court of Manila (Exhibit Xs and 9), the trial court disregarded them in its decision.

The defendant raises, as appellant, four alleged errors on the part of the lower court, namely: (1) "in not applying the payment of ₱1,300 to the proper obligation," Exhibit A; (2) "in considering Exhibits D and D–1 in this case, not being valid documents"; (3) "in holding that what the plaintiff-appellee sold to the defendant-appellant was only the formula for the manufacture of vinegar and did not include the ESKA label"; and (4) "in denying the motion for reconsideration and new trial."

In support of the first alleged error, the appellant asserted that this amount of ₱1,300, represented by Exhibits 1, 2 and 3, should have been applied to the installment due on the bill of sale, Exhibit A, and not to the invoices marked as Exhibits D and D–1, on the ground that the former is of earlier date than the latter (Philippine National Bank *vs.* Veraguth, 50 Phil., 253). Appellant further claims that the obligation under Exhibit A is more burdensome to the defendant than those contained in invoices D and D–1, and for that reason such amount of ₱1,300 should be applied to the former, in accordance with the provisions of Article 1174, Civil Code.

Both contentions are belated. When the defendant accepted without any protest the first receipt (Exhibit 1), in which the plaintiff specified expressly and unmistakably the obligation to which such payment was to be applied, namely, "on account invoice June 7, 1945," he renounced the right of choice that he enjoyed under the existing laws, and he can no longer contest the application made nor demand now that the payment be applied to another debt (art. 1172, Civ. Code). Moreover, the payments indicated in Exhibits 2 and 3 were applied to the invoice Exhibit D, upon an unequivocal and unambiguous designation by the debtor, namely "on account, contract June 7th, 1945"; this is a choice that he cannot change at a subsequent date (Bachrach *vs.* Golingco, 39 Phil., 918).

It is true that Exhibits 2 and 3 were prepared by the defendant's wife and that it was the latter who accepted them as well as Exhibit 1. The defendant, however, is in estoppel to disown the acts of his wife, because she was not only the treasurer of their business and the one in charge of making the payments (t. s. n., p. 23), but the defendant must have seen or should have seen also such receipts after they were given or returned by the plaintiff, properly signed, to his (defendant's) wife, as they form part of the business records that were under his control (t. s. n., p. 31). The degree of instruction attained by the

defendant's wife as a graduate nurse (t. s. n., p. 29) and her confessed familiarity with all the business transactions of the establishment (t. s. n., p. 21) placed her in a vantage position to protect the business interests of her husband, the defendant herein, had there been any real need for such action. She understood and knew what she was doing not only when she prepared on her own typewriter the receipts Exhibits 2 and 3, but also when she accepted them from the plaintiff, including Exhibit 1.

The pretense of the defendant, therefore, that these payments should be applied to the agreed purchase price in the bill of sale, Exhibit A, is not only belated but is contrary to the established law and judicial precedents.

It is also true that the invoices dated 7 June 1945 and 1 August 1945 were not alleged in the complaint. But it was the defendant himself who placed them in issue when he claimed that he has paid in full, or, at least, for an amount bigger than the sums credited to him by the plaintiff. When the defendant attempted to prove that he had paid the sum of ₱1,300, in addition to the amounts acknowledged by the plaintiff to have been received for and on account of the installment payments agreed in the bill of sale, Exhibit A, the plaintiff acquired the right of establishing on his part that such amount of ₱1,300 was applied to the payment of the invoice indicated in express and clear terms in the receipts, marked 1, 2 and 3. They came out by way of impeachment of the defendant's evidence and by way of rebuttal evidence for the plaintiff. The plaintiff could not have logically pleaded these invoices in his complaint, when in legal contemplation, at least as far as the plaintiff was concerned, the defendant had paid for them.

The defendant argues most ably although unconvincingly that the trial court not only erred but incurred as well an inconsistency when it considered Exhibits D and D–1 as valid in themselves and with a probative value, although they were unsigned, and despite the trial court's own statement that "in the condition they are, they cannot by themselves bear proof to the receipt of the goods listed therein and overcome defendant's denial of their delivery to him."

A written instrument is not always necessary to perfect a contract of purchase and sale of goods and merchandise, as contracts shall be binding, whatever the form they may have been entered into, provided that the essential conditions required for their validity exist (art. 1278, Civ. Code.) The consent of the contracting parties is implicit in the delivery of the goods and merchandise by the plaintiff and in the acceptance thereof by the defendant; there was a definite object, consisting of the goods and merchandise listed in the invoices; and there was a consideration, indi-

cated by the prices mentioned after each item (Art. 1261, Civ. Code). Not even a memorandum or note duly subscribed by the defendant is required, because he accepted and received the goods [Rule 123, sec. 21 (*d*), Rules of Court].

The mention of the "invoice (contract) of 7 June 1945" in Exhibits 1, 2 and 3 is the best indication that the defendant had received the articles covered by Exhibit D, at least.

The appellant, in his motion for reconsideration and new trial, dated 8 April 1946, has admitted impliedly the delivery of the goods and merchandise covered by Exhibits D and D–1, in the following language:

> "After the trial the defendant discovered that the invoices Exhibits D and D–1 covered dilapidated cans, cracked earthenware jars, all of which were excluded by the plaintiff and the defendant when they entered into an agreement on May 16, 1945, per Exhibit A."

In fact, the defendant admitted also actual possession of such goods and merchandise, when in the same motion, he alleged:

> "Since the evidence which will be presented consists of discarded supplies and equipment, it is very evident that the plaintiff is unjustly enriching himself at the expense of the defendant."

It is apparent from the foregoing quotations taken from the aforesaid motion for reconsideration and new trial that the court *a quo* did not err in denying it, for the evidence offered is neither new nor material and relevant, and could not, as a whole, change the decision of the lower court. Even assuming that the goods and merchandise covered by Exhibits D and D–1 consisted of dilapidated cans, cracked earthenware jars and discarded supplies and equipment, the defendant has lost his right to protest after he had accepted them at the time they were delivered and had not taken immediate steps to protect himself. The goods were delivered to him on 7 June and 1 August 1945 and he claimed having been fooled on 8 April 1946. He could have established the same defense that he now asserts in this motion when the plaintiff produced the invoices D and D–1 during the trial, in rebuttal of defendant's claim that a misapplication of payment was made. He chose to rely on his now discredited theory that the invoices were fictitious or that the goods were never delivered or received by him. As stated in the oft-quoted case of Valles *vs.* Villa, 35 Phil., 769,

> "The law furnishes no protection to the inferior simply because he is inferior any more than it protects the strong because he is strong. The law furnishes protection to both alike—to the one no more or less than to the other. It makes no distinction between the wise and the foolish, the great and the small, the strong and the weak

The foolish may lose all they have to the wise; but that does not mean that the law will give it back to them again. Courts cannot follow one every step of his life and extricate him from bad bargains, protect him from unwise investments, relieve him from one-sided contracts, or annul the effects of foolish acts. Courts cannot constitute themselves guardian of persons who are not legally incompetent."

The plaintiff did not require the defendant to sign these invoices because they were then good friends (t. s. n., p. 9) and the defendant was still enjoying a good reputation (t. s. n., p. 15). The delivery of the merchandise covered by Exhibit D was made when the defendant was still complying faithfully with the terms of the original contract, Exhibit A.

As to the testimony of Mrs. Carmen C. Arana, supposed buyer of the vinegar factory in question, her quibblings and evasive answers on important facts are so significant that we are convinced that she was neither in a position nor even intended to buy the factory. She pretends that she refused to buy the factory unless the papers were properly cleared out in the Bureau of Commerce, intimating that she wanted the trade-mark ESKA, for vinegar, to go with the sale. When she was asked whether or not she had read the original bill of sale, Exhibit A, she repeatedly said that she never read the contents thoroughly although she was given the deed (t. s. n., p. 34).

But forgetting herself and to bolster up the pretense that she knew what she was talking about and that she knew what she was going to buy, she asserted on her cross-examination:

"P. En otras palabras, el único papel que Ud. vió concerniente al negocio de vinagre es el contrato de venta de Mr. Kander que Ud. no lo leyo, no es así?

"R. Leí muy bien, porque como era el contrato de venta de vinagre entre Dannug y yo, así es que estaba interesado en lo que quería decir." (T. s. n., pág 35.)

If her last statement represents the truth, which we seriously doubt, she would have noticed this paragraph in Exhibit A:

"It is further agreed that the vendee will not transfer nor sell the ESKA labels, if he so desires to sell the vinegar factory."

We agree with the trial court in disapproving the application of a portion (₱250) of the sum of ₱1,300 to the payment of "Exhibit D–1," for this invoice was never mentioned by the defendant in Exhibits 1, 2 and 3. In the absence of an express authority from the debtor, the balance of ₱250, left after paying off Exhibit D, must be applied to Exhibit A.

In a last minute effort of appellant to change the tide, his counsel suggested during the hearing before this court

and in the course of his oral arguments that there was some question as to the jurisdiction of this court over this case in view of the fact that the plaintiff is an enemy alien. Counsel was required to submit in writing the point he raised, and, consequently, he filed a pleading which he entitled a "motion to dismiss," based on two grounds:

"1. That plaintiff-appellee being a German citizen and therefore is an enemy alien has no personality to appear before our courts of justice; and

2. That this court has no jurisdiction over the case."

In support of the first point, counsel claims that "it was only lately that we discovered for the first time that plaintiff-appellee is a German citizen" and as "an enemy alien" he "has no personality and capacity to sue before our courts of justice"; and in support of the second, counsel contends that "since plaintiff-appellee lacks the legal capacity and personality to appear and sue before our courts of justice, it follows that this Honorable Court has no jurisdiction over the case" and "the present appeal should be dismissed."

Counsel for appellant has relied as authority, in support of his stand that the plaintiff, being an enemy alien, has no standing in our courts of justice to prosecute this case, on the decision in Zimmerman *vs.* Hicks, 274 U. S. 523, and on 67 C. J. 361–63. The page given by counsel in Volume 274 of the United States Reports does not contain the case indicated; we presume, however, that counsel intended to refer to page 253 of the same volume, but it is unfortunate that the case mentioned has no bearing on the point for which it was cited by counsel.

The first issue that this court has to determine is that of jurisdiction, because if the appellant's point is well taken, then we will have to certify this case to the Supreme Court, in view of the mandatory provisions contained in section 138, paragraph (3), Revised Administrative Code, as amended.

Section 3 of Article II of our Constitution specifically provides that "The Philippines * * * adopts the generally accepted principles of International Law as part of the law of the nation."

An enemy alien was not considered a "persona in *judicio standi*" during the period of war. It was the general rule that such alien enemy had no standing before the courts of justice of the state against whom the country of his allegiance was at war in the prosecution of suits either as plaintiff or active subject. This limitation was based on public policy, for it was considered that courts will give no assistance to prosecute an action which, if successful, would lead to the enrichment of an alien enemy, and therefore, would tend to provide his country with

sinews of war [Rodriguez *vs.* Spayer Bros. (1919) A. C. 59, 66]. Again, if the enemy alien may recover through his action property that might add to the resources of the power, of which he is a subject or citizen, then at war with the country of the forum in whose court he seeks redress, then his action is suspended [Porter *vs.* Frendenberg (1916) K. B. 857, 880].

But it is the consensus of opinion among modern authorities of continental Europe on International Law that this general rule has been superseded by Article 23 (*h*) of Annex No. IV, entitled "Regulations respecting the Laws and Customs of War on Land," of the Hague Convention of 18 October 1907, which provides that it is "especially forbidden,"

> "To declare abolished, suspended, or inadmissible in a Court of Law the rights and actions of the nationals of the hostile party." (TM 27-251, U. S. War Department, pp. 23-24.)

American and English writers contend, however, that this limitation applies only to military commanders in the field but not to the civil governments of the belligerent nations. If the *raison d'etre* of the rule suspending an action interposed by an enemy alien for the duration of the war is to prevent the country of which such alien enemy is a national from increasing her resources, we cannot agree with the proposition that the aforequoted regulation approved at the Hague Convention of 1907 is a prohibition of such limited character. The successful proponents of the prohibition argue that it was intended as a prohibition of general character.

But whether or not the Hague Convention of 1907 has changed the old rule, the opinion of an overwhelming majority is that the judicial action of the enemy alien is not barred absolutely but merely suspended for the duration, and that such suspension is lifted upon termination of the war. Moreover, the incapacity of such enemy alien to prosecute his action as a party plaintiff in time of war is a matter of affirmative defense, partaking of the nature of a plea in confession and avoidance (Rule 9, sec. 9, Rules of Court). It must be specifically pleaded, for otherwise it will be deemed waived (Rule 9, sec. 10 Rules of Court; Cf. Maxilom *vs.* Tabotabo, 9 Phil., 390; Society for Propagation of Gospel *vs.* Wheeler, 22 Fed. Cas. No. 13156, 2 Gall. 105, Dorsey *vs.* Thompson, 37 Md. 25, McNair *vs.* Toler, 21 Minn., 175, Heiler *vs.* Goodman's ets., 92 N. J. Law 415, 105 Atl. 233, 3 A. L. R. 336, Burnside *vs.* Matthews, 54 N. Y. 78, Barna *vs.* Cleason ets., 83 W. Va. 216, 98 S. E. 158, Kristel *vs.* Michigan ets. 213 Ill. App. 518).

The issue raised by the defendant-appellant, therefore, does not affect the jurisdiction of the court either on the

defendant or the subject-matter. It is a plea in abatement that should have been alleged specially in the answer, through a specific negative averment (Rule 15, sec. 11, Rules of Court), if the defendant believes that the condition affects the capacity to sue of the party plaintiff. A mere suggestion during the hearing or even a formal motion to dismiss during the appeal fails to comply with the procedural requisites. The motion, which amounts to a self-serving statements, as far as it classifies the plaintiff to be a German citizen, without any other supporting allegation of facts, is not even verified by the party or by counsel. Under the stated rule the motion is belated and the plea in abatement is deemed to have been waived. The question raised, therefore, is not one that affects our jurisdiction but it is a mere procedural issue that comes within our power and competency to determine.

There is, in addition, a moral consideration that affects this belated plea. In our examination of the records, searching for a possible justification of the defendant's allegation that the plaintiff is a German citizen, we notice that Exhibit A,—which is precisely the bill of sale on which the plaintiff bases his action against the defendant—describes the plaintiff as "a native of Germany." This document was executed on 16 May 1945, at a time when the war efforts against Japan were still at their highest. The war in Europe had just ceased, as V–E Day was declared officially by the Allied powers on 13 May 1945. The defendant did not hesitate in receiving and taking the goods and merchandise covered by this agreement, and he operated the vinegar factory and sold its products. He defaulted in the payments stipulated in the contract, but when the action was brought against him, he objects to the enforcement of his obligation, despite the benefits received and derived, on the excuse that plaintiff is a German citizen. It is a stand that shocks our conscience and tramples all the basic principles of justice and equity.

The description of the plaintiff as a "native of Germany" does not amount to an admission that he is a citizen as well of that country. It is within the judicial notice of this court, for it is a matter of historical and public knowledge, that a few years before World War II, a great number of persons, natives of Germany and other powers of Central Europe, were allowed to land and enter our country. It was an act of humanity for these refugees, who were indiscriminately persecuted in their native countries on account of racial prejudice. No argument is needed to sustain in this jurisdiction the conclusion that the allegation of the "German citizenship of the plaintiff is insufficient; it must be alleged besides that he is an "enemy alien."

Defendant must negate every presumption that could arise in favor of the plaintiff's right to sue. This plea in abatement of the action is so unpopular that it has been termed as an "odious plea" (27 R. C. L. 934). The plea must avert the plaintiff's enemy character and that he has not the license of the government to remain in the country. The burden of proof is upon the defendant. Upon failure of proof that the plaintiff is a citizen or subject of the enemy nation the plea must be overruled (Ozbold *v.* Limberman's Indemnity Ex. [Tex.—Civ. App.] 204 S. W. 252).

There is no allegation nor proof in the records that the plaintiff was ever molested either by the United States or the Philippine Government in his former business as a vinegar manufacturer. The sale of the factory and its equipment and other miscellaneous goods and merchandise to the defendant proves that he was not even interned or that his properties and funds had been blocked at least by the Government. If the Alien Property Custodian of the United States of America or the present Philippine Alien Property Administration, also of the American Government, had considered the plaintiff as an enemy alien, he would not have been allowed to dispose or to transfer this property, for either one would have taken possession of all the assets and of the business. On the contrary, the Bureau of Commerce and Industry registered in his name the trademark ESKA (Exhibits 7 and 8). He might be an alien but there is no scintilla of evidence that he is an enemy alien.

In view of these considerations, the judgment of the lower court is affirmed, with costs against the defendant.

It is so ordered.

Jugo and De la Rosa, JJ., concur.

Judgment affirmed.

[No. 243-R (L-679). March 31, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* MAGNO CARPIO Y CAMILLO and RICARDO CAPUSO Y OCAMPO, defendants. RICARDO CAPUSO Y OCAMPO, appellant.

1. CRIMINAL LAW; ROBBERY IN BAND; EVIDENCE; IDENTIFICATION OF ACCUSED, NOT INDISPENSABLE; CASE AT BAR.—Even admitting that the accused was not identified by the offended party, yet, the evidence of record conclusively shows his guilt for (1) he could not explain satisfactorily how he came to possess the stolen ring which he gave to his mother; (2) he was unable to successfully rebut the testimony of the policeman about his (accused) admission that he participated in the robbery at bar; and (3) he failed to overcome the evidence for the prosecution establishing the fact that he together with his co-accused indicated the place where they hid the revolvers which they used in committing the robbery in question.

2. ID.; EVIDENCE; "ALIBI" AS A DEFENSE MUST BE CLEARLY PROVED.—The defense of *alibi*, not being proved by any positive and convincing evidence, cannot be entertained.

APPEAL from a judgment of the Court of First Instance of Manila. Peña, J.

The facts are stated in the opinion of the court.

Nicolas L. Dasig for appellant.

Acting First Assistant Solicitor-General Gianzon and *Acting Solicitor Torres* for appellee.

ENDENCIA, *J.:*

This is a case appealed from the Court of First Instance of Manila wherein appellant Ricardo Capuso y Ocampo, together with one Magno Carpio y Camillio, was charged with robbery in band under the following information:

"That on or about the 3rd day of February, 1946, during nighttime which was purposely sought and by means of disguise, in the City of Manila, Philippines, the said accused, together with two others, conspiring, confederating and mutually helping one another, all armed with firearms, the last two having made good their escape and as yet unidentified, did then and there willfully, unlawfully and feloniously break into and enter house No. 999 Constancia in said city, then inhabited by one Catalino Romero, and by means of threats and intimidation, to wit: by pointing at said Catalino Romero a .45 caliber pistol, tying and kicking him and other members of his household, and with intent of gain, take, steal and carry away money in cash consisting of coins and bills, one man's ring and one woman's ring, all amounting to ₱8,018 belonging to Catalino Romero, to the damage and prejudice of the same in the aforesaid sum of ₱8,018, Philippine currency."

After due trial, that court found the appellant responsible beyond reasonable doubt of the crime of robbery in band, as provided for and penalized in article 294, paragraph 3, of the Revised Penal Code, but it appearing that said defendant was only 17 years of age, the court, in accordance with article 30 of the said code as amended by Commonwealth Act No. 99, instead of pronouncing judgment of conviction, suspended all further proceedings and ordered his commitment to the Philippine Training School for Boys in Mandaluyong, until the age of majority, and directing the superintendent of said institution to submit to the court every four months a written report on the good or bad conduct, as well as on the moral and intellectual progress of the appellant.

Not satisfied with the decision, appellant perfected his appeal to this court and now claims that the trial judge has committed the following errors:

"I. The trial court erred in not acquitting the accused-appellant on the ground that the identity of said accused is not established by the eyewitness of the prosecution.

"II. The trial court erred in giving due weight and credit to the testimony of the prosecution witnesses notwithstanding the fact that they contradicted each other and therefore they should not be believed.

"III. The trial court erred in convicting the accused-appellant solely upon the finding of the ring alleged to have been a part of the goods robbed by the accused-appellant.

"IV. The trial court erred in not acquitting the accused-appellant of the crime charged in the information notwithstanding the fact that his guilt is not proven beyond all reasonable doubt."

As to whether the crime described in the information, as quoted above, has been perpetrated on the date and place at bar, there seems to be no question. Appellant himself in his brief raises no issue on this point. He contends, however, that his identity was not properly established by any witness of the prosecution, who, according to him, incurred in many contradictions and should not be given any credence; that the finding of the ring—which was part of the stolen property—in the possession of his mother should not have been taken into account against him; and that his guilt was not proven beyond reasonable doubt, for all of which reasons he should have been acquitted by the lower court.

Upon careful examination of the evidence of record, this court is fully satisfied that the following facts were established: That at about seven o'clock in the evening of February 3, 1946, while Catalino Romero was taking supper with his family in his house at 999 Constancia Street, Sampaloc, Manila, two strange men with revolvers came up and told him not to move and to hand over his money. Thus threatened, he gave them ₱446 but not satisfied with this, one of the robbers kicked him in the buttock and told him to give more, so he had to yield a bag containing ₱2,100 and a ring worth ₱500. Then the robbers tied his hands from behind, and in order to force him to give more money, one of the robbers stepped on the chest of his little child, seeing which Romero's wife pointed to a further sum of ₱5,000 kept in a trunk nearby. The robber got this and also a ring worth ₱100 from Romero's wife plus another ₱21, in cash. While all these things were going on, the other robber was standing on guard with his pistol pointing at Romero and his wife. As the money was received, it was handed over to two men downstairs standing guard with carbines. The robbers were all masked but the mask of one of them was dropped by a sudden movement, and for this reason Catalino Romero recognized him to be Magno Carpio, one of the accused. After the robbers had accomplished their purpose, they left the place.

While it may be considered that Catalino Romero did not recognize appellant as one of those four men that came up his house to commit the robbery at bar, and while it may be further admitted that the witnesses for the prosecution have incurred in some contradictions about some details of the robbery and as to whether appellant was or was not recognized by the offended party Catalino Romero, yet there are in the record circumstantial evidence sufficient to point the appellant as one of the perpetrators of the robbery in question. Indeed, the evidence shows that after Magno Carpio was arrested, he squealed that Ricardo Capuso was one of his companions in said robbery, and because of this, Ricardo Capuso was arrested and taken to police headquarters where, after some efforts to deny any intervention therein, he confessed his participation in the crime and said further that his share of the booty was a ring, Exhibit A, which he gave to his mother. Then the police sent for Ricardo's mother who, upon being required to surrender the ring, did so, saying that she never thought his son Ricardo Capuso could commit a crime. With these facts in view, and unless the appellant could explain otherwise, how he happened to be in possession of the ring that he gave to his mother, which is part of the stolen goods, the conclusion is inescapable that he took part in the commission of the robbery at bar. Appellant tried to show, however, that on January, 1946, Magno Carpio pawned the ring in question to his mother who thus came to have it, but this contention cannot be given any credence because the ring in question was stolen from Catalino Romero on the night of February 3, 1946, and it is completely impossible that on January of 1946, Magno could have pawned it to appellant's mother.

Again the evidence shows that after the arrest of Magno Carpio and the appellant Ricardo Capuso, and after being confronted with each other in the latter's house by the policemen, they talked secretly together and afterwards decided to point out to the policemen the place where they hid the pistols they used in committing the robbery. Accordingly, they were then brought to the place—which was a place under the house of Magno—where said pistols were actually found by the policemen. Shortly thereafter, appellant was investigated about said pistols and then he told the policemen that said pistols were the very ones they used in the robbery in question and that he and Magno had bought them from some colored soldiers. These statements, together with the previous ones already mentioned above, conclusively show the connection of appellant with the robbery in question.

Coming now to appellant's contention that he should be acquitted because he was not properly identified by the offended party and that, in fact, the latter testified that the companion of Magno Carpio in committing the robbery in question was taller than the appellant, the court believes that, even admitting that the appellant was not identified by Catalino Romero, yet, the evidence of record conclusively shows his guilt for (1) he could not explain satisfactorily how he came to possess the ring, Exhibit A, which he gave to his mother; (2) he was unable to successfully rebut the testimony of the policemen about his (appellant's) admission that he participated in the robbery at bar; and (3) he failed to overcome the evidence for the prosecution establishing the fact that he together with Magno Carpio indicated the place where they hid the revolvers which they used in committing the robbery in question. In this connection, the court finds application of the following doctrines:

"While the persons who committed the robbery of a certain carabao were not recognized and their identity is entirely unknown, nevertheless, the accused having been found in the possession of the stolen carabao, shortly after the commission of the crime, without the necessary documents to justify ownership and possession under the law, and no explanation being made of such possession, his conviction was justified." (U. S. *vs.* Divino, 18 Phil., 425.)

"Possession of stolen property is regarded as evidence against its possessors." (U. S. *vs.* Barroga, 21 Phil., 161.)

"Unexplained possession of part of the contents stolen from a trunk, shown to have been broken open not long before the time accused was seen in such possession, is competent evidence of the robbery." (U. S. *vs.* Castro, 23 Phil., 67.)

"When only a part of the stolen property which was stolen at the same time and place is found in the possession of the one who is unable to give a satisfactory explanation of his possession of the same, that fact is sufficient in itself to sustain the finding that he is guilty of the larceny of all the property, as one who obtains possession of property legally will have but little difficulty in justifying his possession." (U. S. *vs.* Mohamed Ungal, 37 Phil., 835.)

Lastly, appellant, by way of positive defense, has attempted to put up an *alibi* through the testimony of the wife who declared that her husband never left home in the night of February 3, but her testimony was not corroborated and consequently the same cannot be given much weight. This defense of *alibi,* not being proven by any positive and convincing evidence, cannot be entertained by this court.

Wherefore, this court, finding no error in the decision appealed from, hereby affirm the same with costs against appellant.

It is so ordered.

Torres and *Felix, JJ.,* concur.

Judgment affirmed.

[No. 582-R. March 31, 1947]

JOAQUIN BALMEO, applicant and appellee, *vs.* JOSEFA SALES, ISABEL SALES, SIMEONA SALES, DOMINGO SALES, and RAYMUNDO MONEDERA, oppositors and appellants; THE PROVINCIAL GOVERNMENT OF CAMARINES SUR, oppositor and appellee.

1. CONTRACTS; CONSTRUCTION AND INTERPRETATION; GENERAL TERM, GOVERNED BY SPECIFIC TERM; TITLE OF A DEED, NOT BINDING.—The fact that the title of the deed is "*escritura de venta con pacto de retro*" is of no consequence, for it is the conclusion of the one who drafted the document, not that of the parties themselves. Under the rules of construction, general terms are governed by specific terms; hence, the title should give way to or be governed by the specific provisions or terms of the agreement (section 60, Rule 123, Rules of Court).
2. EVIDENCE; ATTORNEY AND CLIENT; ADMISSIONS OF COUNSEL, NOT ADMISSIBLE IN EVIDENCE AGAINST CLIENT IN ANOTHER CASE.—The contentions of counsel in another case, even granting that they are admissions, are not admissible as against the defendant in this case, because there was no evidence submitted to prove that such contentions were specifically authorized by the client (Jones on Evidence, 2nd ed.. sec. 955; Wigmore on Evidence, 2nd ed., sec. 1063, Vol. IV, p. 43).
3. ID.; ID.; ID.; ESTOPPEL, ELEMENTS OF.—It may be stated in passing, however, that even if said contentions were admissible, estoppel can not arise, for estoppel requires as elements (1) the deliberate misleading of another (2) to his prejudice, which elements do not appear in this case.

APPEAL from a judgment of the Court of First Instance of Camarines Sur. Prieto, J.

The facts are stated in the opinion of the court.

Luntok & Luntok for appellants.

Ezequiel S. Graceda for appellee Joaquin Balmeo.

Provincial Fiscal Yanson for oppositor-appellee. The Provincial Government of Camarines Sur.

LABRADOR, *J.:*

The above-entitled proceeding was instituted by Joaquin Balmeo in the Court of First Instance of Camarines Sur for the purpose of registering a parcel of land, designated as Lots 1 and 2 of plan Psu-106028, situated in the barrio of Cadlan, municipality of Pili, Camarines Sur. Josefa Sales, Isabel Sales, Simeona Sales, Domingo Sales, and Raymundo Monedera filed an opposition to the registration, alleging that the land applied for includes a parcel of rice land belonging to them and which they have possessed for fifty years, and praying that the application be denied and the portion claimed by them be registered in their name. The land claimed by the oppositors was designated in the course of the trial as portion 3 and the same is indicated on the plan Exhibit A as the north-

eastern portion of lots Nos. 1 and 2, northeast of a straight line connecting point 5 of lot No. 1 and point 3 of lot No. 2.

The evidence shows that this contested portion originally belonged to Ciriaco Sales, deceased father of the oppositors, and that he had inherited it from his father; that on May 17, 1922, he conveyed this portion to the applicant under a deed denominated *escritura de venta con pacto de retro,* Exhibit B (translation Exhibit B–1); that he continued in possession of the land, but gave "canon" or a share in the products to the applicant until the year 1936; that this portion became the subject of an action of detainer before the justice of the peace in the year 1937, and said justice of the peace rendered a decision, copy of which is Exhibit F.

After hearing the Court of First Instance ordered the registration of all the land included in the survey, including portion 3, dismissing the opposition of the oppositors, heirs of Ciriaco Sales. Against this decision the oppositors have prosecuted this appeal, assigning as errors of the trial court (1) the finding that Exhibit B, under which the applicant acquired the contested portion, is a deed of sale with right to repurchase and (2) the registration of the contested portion in the name of the applicant instead of the oppositors. In support of the first assignment of error it is argued that the parties who executed Exhibit B intended to enter into a contract of guaranty for the amount of ₱104, because (1) the document uses the word *cansangraan* which is indicative of the contract of pledge, (2) there was no sale but only a transfer of possession and of usufruct, not of title, and (3) there was no agreement that upon failure to redeem the contract shall become consumated and inrrevocable.

In its learned decision, the trial court gives various reasons why the deed, Exhibit B, should be considered as sale with right to repurchase, but after a careful examination of the deed in question we feel that the construction placed upon it by the trial court is forced, and is not the natural or ordinary import of the terms of the deed under the circumstances surrounding its execution.

The fact that the title of the deed is *escritura de venta con pacto de retro* is of no consequence, for it is the conclusion of the one who drafted the document, not that of the parties themselves. Under the rules of construction, general terms are governed by specific terms; hence, the the title should give way to or be governed by the specific provisions or terms of the agreement (section 60, Rule 123, Rules of Court).

One very important circumstance evidently overlooked by the trial court is the fact that the contested portion 3 was, prior to 1923, pledged to Mariano Tongi, together with portion 2, and that they (plaintiff and Ciriaco Sales) redeemed them from Tongi. Sales sold portion to plaintiff but remained in possession of portion 3, executing in favor of plaintiff the deed, Exhibit B (t. s. n., p. 7). So it is that the first paragraph of Exhibit B is so worded as to indicate that Sales and his wife received from plaintiff ₱104, the amount for which the land was pledged to Tongi, or which amount was used to redeem the land from Tongi. If the transaction between Sales and Tongi was merely a pledge, as the use of the term *cansangraan* implies, and the ₱104 was received only to redeem the land from Tongi, it is evident that what the contracting parties agreed upon was the mere transfer of the pledge from Tongi to the plaintiff. Sales could not have meant to convey it now under a sale with right to repurchase to plaintiff, as there were no reasons for him to do so, and there was no indication at all that such was his purpose.

A significant fact about the deed is its recital that the signer received the amount of ₱104, which is the *cansangraan* or the amount for which the property is pledged. If the parties have meant a sale, they would have indicated the ₱104 as the "price", not the *cansngraan* merely of the land.

Another significant fact about the deed is the peculiar absence of a word or phrase indicative of a sale, conveyance, assignment or transfer of the ownership or title to the land. The deed, according to its translation, Exhibit B–1, only operates to transfer or convey the right of possession and usufruct. Thus, it says:

> "We have also agreed to cede and transfer our right of possession and usufruct of the land."

The trial court was of the impression that there was a conveyance or transfer of *derecho, posesión, y gozo*, and in this respect it might have been misled.

The trial court states that the fact that plaintiff has paid the land tax since 1924 also indicates that the transaction is a sale. But when it is to be remembered that he received a "canon" and acquired the possession and use of the land and that he made the payment for the account of Ciriaco Sales, in whose name the land continued on the tax records until the year 1940 (See Exhibits G and H), said payment becomes of no consequence.

Emphasis is placed by the trial court and by the appellee on the alleged admissions of defendant in the trial

of a case of forcible entry and detainer, which admissions are alleged to appear in the judgment of the justice of the peace court, Exhibit F. A careful study of Exhibit F fails to disclose the existence of any supposed admission on his part that the agreement is a sale with right to repurchase. It does not appear from said judgment that defendant testified at the trial and personally made the supposed admission. On the contrary, it appears that the supposed admissions are the contentions of his counsel. These contentions of counsel, even granting that they are admissions, are not admissible as against the defendant in this case, because there was no evidence submitted to prove that such contentions were specifically authorized by the client (Jones on Evidence, 2nd ec., sec. 995; Wigmore on Evidence, 2nd ed., sec. 1063, vol. IV, p. 43).

It is unnecessary for the court to pass upon the contention of counsel for the appellee that the oppositors are now estopped to deny that the contract between appellee and their predecessor in interest is a *pacto de retro* sale, n view of the conclusion reached by the court with respect to the admissibility of the arguments or admissions of counsel as evidence against his client. It may be stated in passing, however, that even if said contentions were admissible, estoppel can not arise, for estoppel requires as elements (1) the deliberate misleading of another (2) to his prejudice, which elements do not appear in this case.

We, therefore, find the first assignment of error to be well taken, and with it the second assignment of error also.

In view of the foregoing, the judgment of the lower court adjudicating portion 3 of Exhibit A is hereby set aside, and judgment is rendered dismissing the application of Joaquin Balmeo as to said portion and adjudicating the same in equal shares to the oppositors Josefa Sales, Isabel Sales, Simeona Sales, Domingo Sales, and Raymundo Monedera, Filipinos, all of age, with residence and postal address at Cadlan, Pili, Camarines Sur. Said oppositors are hereby ordered to file a plan of the portion thus awarded to them, duly approved by the Director of Lands, within a period of ninety days from the date of notice of this decision. A refund by the oppositors to the applicant of one third of the expenses incurred in the survey of the land and of the fees paid in this registration proceeding is also ordered (section 37, Act No. 496, as amended by sec. 2, Act No. 3621). So ordered.

Montemayor, Pres. J., and *Concepcion, J.*, concur.

Judgment reversed.

[No. 257-R (L-706). Abril 11, 1947]

VICENTE ROQUE, demandante y apelado, *contra* RODOLFO BAYOT, demandado y apelante

ARRENDAMIENTO; LEY NO. 689, ARTÍCULO 1; INTERPRETACIÓN; EL PLAZO DE SEIS MESES DEBE CONTARSE DESDE LA FECHA DE LA OCUPACIÓN INICIAL.—Concurrimos con la interpretación dada por el tribunal inferior de que el plazo de seis meses de arrendamiento provisto en el Artículo 1 de la Ley 689, aprobada el 15 de octubre de 1945, debe de contarse desde la fecha de la ocupación inicial de la propiedad y no desde el día en que al inquilino se le requiera que la desaloje. Siendo esto así, no puede en modo alguno sostenerse que la acción entablada por el demandante es prematura.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Manila. Peña, J.

Los hechos aparecen relacionados en la decisión del tribunal.

D. José Sotelo en representación del apelante.
D. Antonio I. Roque en representación del apelado.

FELIX, *M.:*

La presente acción no es más que una modalidad del estado precario resultante de la lucha por la liberación de Manila que dejó en escombros y convirtió en ruinas la mayor y más bella porción de la capital del Estado. Reducido a casi la mitad el número de sus viviendas, el vecindario de Manila, acrecentado por la población flotante, se vió en la precisión de acomodarse en los albergues y *barong-barongs* disponibles, situación anómala que ha creado para el Gobierno un serio problema hasta ahora irresuelto a pesar del tiempo transcurrido.

La demanda que dió inicio al caso de autos se presentó en el Juzgado Municipal de Manila el 17 de noviembre de 1945, y en ella se alega, entre otros hechos, que el demandado Rodolfo Bayot era el arrendatario de la finca situada en el No. 2539 de la Calle Leonor Rivera del distrito de Tondo, Manila, que ocupada por el alquiler mensual de ₱28, pagadero por adelantado dentro de los primeros cinco días de cada mes; que dicho demandado dejó de pagar los alquileres correspondientes a los meses de octubre y noviembre de 1945; que el demandante necesitaba la finca en cuestión para su hijo Ricardo Roque y su familia, y que siendo el arrendamiento de la finca de mes a mes, y habiendo transcurrido dos meses sin que el demandado pagase el alquiler correspondiente, el demandante, previa la notificación prescrita por la ley para la interposición de la demanda, le requirió que desalojara la finca y le pagara las mensualidades devengadas.

En el Juzgado Municipal el demandante obtuvo sentencia favorable que en apelación confirmó el Juzgado de Primera Instancia de Manila, condenando al demandado a desalojar la casa y el solar objeto del desahucio (No. 2539 de la Calle Leonor Rivera, Tondo, Manila), a pagar la renta de ₱28 mensuales a contar del mes de octubre de 1945, hasta que desocupara la casa, con intereses legales a partir del 17 de noviembre de 1945 (fecha de la incoación de la demanda en el Juzgado Municipal), más las costas del juicio.

De nuevo el demandado apeló de esta decisión para ante el Tribunal Supremo el que, después de recreado el Tribunal de Apelaciones, certificó la causa a este Tribunal. En esta instancia el apelante sostiene que el juzgado inferior incurrió en error al condenar al demandado (1) al pago de alquileres; (2) a que evacué la casa en cuestion; y (3) al pago de las costas.

Revisadas las pruebas aportadas en el juzgado inferior, este Tribunal encuentra que se han establecido satisfactoriamente los hechos esenciales de la demanda; que la suma de ₱56 correspondiente a los alquileres de los meses de octubre y noviembre de 1945, sólo se depositó en el juzgado después de entablada la presente acción; y que desde el mes de octubre de 1945 el demandante ya le había requerido al demandado que desalojase la casa porque la necesitaba para su hijo.

Dada la crisis imperante de viviendas, no es de extrañar que el demandante, pasando por alto y sin tener en cuenta que el demandado había sido su inquilino de muchos años y que siempre fué puntual y cumplido en sus compromisos, se aproveche del retraso indicado para acommodar a su hijo; tampoco sorprende que el demandado a su vez agote todos los recursos que estén en su mano para retener por más tiempo la posesión de la finca. Pero al considerar los méritos de esta apelación y aunque el dicho vulgar afirme que la necesidad carece de ley, este Tribunal no puede menos de ajustar su decisión a los hechos probados y a las disposiciones del código, y al hacerlo así tiene que declarar que el juzgado *a quo* no ha cometido ninguno de los errores que el apelante le atribuye. Aunque fuera cierto lo que pretende el demandado de que no pagó los alquileres de los meses de octubre y noviembre de 1945 porque el demandante rehusó aceptarlos, tal pretensión corroboraría la alegación del demandante de que en dicho mes de octubre le pidió que abandonara la casa porque la necesitaba para su hijo, petición o requerimiento que podía hacer en el ejercicio de su derecho de propiedad, toda vez que el contrato de arrendamiento celebrado con el demandado sólo era de mes a mes. Este Tribunal lamenta que la

escasez de alojamientos ocasione molestias e inconveniencias al vecindario de Manila, pero en el caso de autos creemos que en justicia no se pueden imponer tales penalidades al demandante privándole del derecho que tiene al disfrute y posesión de su finca.

Concurrimos con la interpretación dada por el tribunal inferior de que el plazo de seis meses de arrendamiento provisto en el Artículo 1 de la Ley 689, aprobada el 15 de octubre de 1945, debe de contarse desde la fecha de la ocupación inicial de la propiedad y no desde el día en que al inquilino se le requiera que la desaloje. Siendo esto así, no puede en modo alguno sostenerse que la acción entablada por el demandante es prematura.

Por tanto, este Tribunal, confirmando la sentencia del tribunal *a quo*, condena al demandado a desalojar la finca ocupada por él en el No. 2539 de la Calle Leonor Rivera del distrito de Tondo de esta Ciudad de Manila, a pagar la renta mensual de ₱28 a partir del mes de octubre de 1945 hasta que desaloje la casa, más las costas del juicio. También se condena al demandado a pagar intereses legales de las sumas que representan los alquileres de octubre y noviembre de 1945 correspondientes al período comprendido entre el 17 de noviembre de 1945 en que se entabló esta causa, y la fecha del depósito en el juzgado de dichos alquileres en mora.

Así se ordena.

Torres y *Endencia, MM.*, están conformes.

Se confirma la sentencia.

[No. 631–R. April 19, 1947]

CONRADO GONZALES, plaintiff and appellee, *vs.* JULIAN MARCELO ET AL., defendants and appellants

1. EXECUTION SALE; PURCHASER BUYS ONLY INTEREST THE JUDGMENT DEBTOR HAS.—The purchaser at a sheriff's sale cannot buy more than the rights and interests of the judgment debtors.
2. DESCENT AND DISTRIBUTION; PARTITION; LACK OF PARTITION PROCEEDINGS DOES NOT PREVENT HEIRS FROM ACQUIRING RIGHTS TO THEIR INHERITANCE; CASE AT BAR.—It is contended that M and T, two of the heirs of the lot in controversy, could not dispose of or sell their portions for the reason that there had been no partition proceedings in regard to the property left by their predecessor. *Held:* This contention overlooks the principle that the rights to an inheritance pass to the heirs from the moment of the death of the predecessor (Articles 657 and 661 of the Civil Code). If it had been established afterwards in partition or other proceedings that M and T had no right to said portions, then the sale would have been void; on the contrary, if the partition of the inheritance has not been questioned as it has not been in the present case, or has been confirmed, this fact validates the sale retroactively to the time it was effected.

3. EVIDENCE; STATUTE OF FRAUDS; EXECUTED CONTRACTS NOT WITHIN SCOPE OF STATUTE OF FRAUDS; ORAL EVIDENCE TO PROVE CONSUMMATED SALE OF REAL PROPERTY, ADMISSIBLE.—Oral evidence as to an alleged consummated sale of real property is admissible in evidence for the reason that the statute of frauds refers only to executory contracts. (Almirol *vs.* Monserrat, 48 Jur. Fil., 70.) Yet oral evidence in cases where ordinarily written instruments are executed has little weight or probative value (Art. 1248, Civil Code).

APPEAL from a judgment of the Court of First Instance of Bulacan. Roldan, J.

The facts are stated in the opinion of court.

Jose C. Borloñgan for appellant.
Marcelo E. Pineda for appellee.

JUGO, *J.:*

This case has been reconstituted for the reason that the original record had been destroyed. The parties agreed that the case be submitted on the documents mentioned in the following stipulation:

"I offer no objection to the printed copy of the Record on Appeal and to the typewritten copies of the Brief for the appellants and one copy of the Brief for the Appellee presented by Atty. J. Borloñgan.

"In addition to what has been presented by Atty. Borloñgan, I hereby present and file (4) four copies of the Brief for the Appellee and five (5) simple copies of Exhibit A.

"I also agreed with Atty. Borloñgan that with the documents and pleadings on hand the instant case can be decided.

"(Sgd.) MARCELO E. PINEDA
"Attorney for the Appellee
"San Miguel, Bulacan
"May 3, 1946

"Conforme:
"(Sgd.) JOSE C. BORLOÑGAN
"Counsel for Appellant
"July 9, 1946."

It will be seen that there is no transcription of the stenographic notes. The deeds of conveyance involved in this case do not form part of the record, with the exception of a copy of Exhibit A, entitled "Proyecto de Partición." However, there is no question as to the substance of said deeds of conveyance which may be gathered from the record submitted, especially from the briefs of the parties.

This is an action for the recovery of a piece of land. The chain of title relied upon by the plaintiff-appellee is as follows: The plaintiff, Conrado Gonzales, inherited one-third (⅓) *pro indiviso* of the land in question from his father, Feliciano Gonzales, who in turn had inherited it

from Braulio Gonzales. Teofila and Modesta, both surnamed Gonzales, each inherited one-third (⅓) *pro indiviso* from Braulio Gonzales.

In the month of May, 1938, Conrado brought action (Civil Case No. 5655, entitled "Conrado Gonzales *versus* Teofila Gonzales and Jose Gonzales") in the Court of First Instance of Bulacan, to obtain said one-third portion which had been sold by Teofila and Modesta Gonzales on 5 November 1928.

The Court of First Instance of Bulacan rendered judgment on 4 August 1938, adjudicating one-third (⅓) of the land in question to Conrado Gonzales and one-third (⅓) each to Teofila and Jose (heir of Modesta), and ordered them to pay indemnity to Conrado in the sum of ₱175 for the occupation of the land, and the costs. In said case the court appointed three commissioners to divide the land between the parties. These commissioners submitted the *proyecto de partición,* Exhibit A, describing by metes and bounds the portion corresponding to each of the three heirs, which was approved by the court.

As the defendants in said Civil Case No. 5655 could not pay the indemnity of ₱175 and the costs, a writ of execution was issued by the court. The sheriff levied upon their shares in the land and sold them at public auction to Arturo Magpayo for the sum of ₱221, and later executed a deed of sale to him on 5 November 1938. The sheriff's deed was registered in the office of the Register of Deeds of Bulacan.

Arturo Magpayo sold his rights and interests in said portions to the plaintiff herein, Conrado Gonzales, so that the latter became the sole owner of the whole property if the sheriff's sale was valid. As the present defendants refused to surrender possession to Conrado, he brought the present action on 25 September 1940.

On the other hand, the defendant Julian Marcelo traces his chain of title as follows: The land was inherited by Teofila, Modesta, and Feliciano (later substituted by his heir Conrado Gonzales), all surnamed Gonzales from Braulio Gonzales. On 5 November 1928, Modesta and Teofila sold the whole lot to Enrica Meneses for the sum of ₱450. The deed of sale was registered in the office of the Register of Deeds of Bulacan. Enrica Meneses sold the land to Ricardo Martinez on 23 May 1934, by means of a deed of sale acknowledged before a notary public. Ricardo Martinez sold it to Carmen Pascual on 31 December 1935, by a deed of sale also acknowledged.

It is claimed that Carmen Pascual sold the land to Julian Marcelo, the defendant herein, in 1937, by means of an oral contract of sale with *pacto de retro.*

By comparing the two chains of title, it will be noticed that the whole land was sold on 5 November 1928 to Enrica Meneses by Modesta and Teofila Gonzales. From this it would follow that Enrica Meneses became the owner of the portions belonging to Modesta and Teofila but not of that pertaining to Conrado, for neither Conrado nor his predecessor consented to the sale.

When the sheriff levied upon and sold the shares corresponding to Teofila and Jose on 5 November 1938, to Arturo Magpayo, he could not transmit anything to the latter as those portions had already been sold on 5 November 1928 to Enrica Meneses. The purchaser at a sheriff's sale cannot buy more than the rights and interests of the judgment debtors.

It is contended that Modesta and Teofila could not sell or dispose of their portions for the reason that there had been no partition proceedings in regard to the property left by their predecessor, Braulio Gonzales. This contention overlooks the principle that the rights to an inheritance pass to the heirs from the moment of the death of the predecessor (Articles 657 and 661 of the Civil Code). If it had been established afterwards in partition or other proceedings that Modesta and Teofila had no right to said portions, then the sale would have been void; on the contrary, if the partition of the inheritance has not been questioned as it has not been in the present case, or has been confirmed, this fact validates the sale retroactively to the time it was effected. Our conclusion, therefore, is that the plaintiff is not entitled to the ownership of the two-thirds (⅔) portion corresponding to Teofila and Modesta Gonzales.

With reference to the one-third (⅓) inherited by Conrado, Teofila and Modesta could not have sold it, not being the owners thereof. However, the defendants contend that they acquired the portion of Conrado Gonzales through prescription of more than ten years. The burden of proof with regard to prescription is upon the party who alleges it. The defendants, in their brief, contend that they have possessed the land since 5 November 1928 up to the time that the present action was brought by the plaintiff on 25 September 1940. The plaintiff, in his brief, denies this assertion of the defendants. There is no finding in the decision appealed from nor any evidence in any other part of the record as to who was in possession of the land before the defendant Julian Marcelo. The transcription of the stenographic notes is not before us and, according to the agreement of the parties, is not part of the reconstituted record to be considered in the decision of the case.

Furthermore, Conrado brought action against Teofila and Jose in May, 1938, and the sheriff levied execution on their shares on 5 November 1938. These proceedings, especially the sheriff's sale at public auction duly published, must have been known by the defendants. To forestall them they allege that there was an *oral* sale of the property in 1937, to the defendant Julian Marcelo. It is very strange that all the other sales were made by the defendants by means of public documents, but belatedly they put up the claim that the property was sold to Julian Marcelo in 1937 *orally*. Oral evidence as to an alleged consummated sale of real property is admissible in evidence for the reason that the statute of frauds refers only to executory contracts. In the case of Almirol *vs.* Monserrat (48 Jur. Fil., 70), it was held that:

"ID.; ID.; CONTRATOS CONSUMADOS.—Tratándose, además, de contrato de venta consumado, como es el que nos ocupa, tampoco es aplicable dicho artículo 335 del Código de Procedimiento Civil, el cual se refiere más bien a contratos ratos (*executory contracts*), y no a los contratos consumados (*executed contracts*)."

Yet oral evidence in cases where ordinarily written instruments are executed has little weight or probative value (Art. 1248, Civil Code). In the present case the defendants, pressed by the demands of the plaintiff, resorted to an alleged oral sale of real property after having executed public documents with reference to former transactions on the same land. There is nothing, therefore, in the evidence presented by the appellants which may successfully counteract the clear title of Conrado Gonzales to one-third of the land, based on hereditary succession.

The Court is, therefore, of the opinion that one-third of the land in question belongs by right of inheritance to the plaintiff Conrado Gonzales, and two-thirds to the defendant Julian Marcelo.

The plaintiff claims damages from the defendants for their occupation of the land. The lower court denied this claim for lack of evidence, which finding, in view of the condition of the record of the case, this Court has to accept.

The judgment appealed from is hereby modified by adjudicating one-third of the property in question to Conrado Gonzales and two-thirds to the defendant Julian Marcelo and ordering the latter to deliver said one-third portion to the plaintiff.

No pronouncement as to costs in this instance.

It is so ordered.

Lim and *De la Rosa, JJ.*, concur.

Judgment modified.

[No. 234-R (L-663). April 29, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* ARTURO DE LA CRUZ Y VELASCO, defendant and appellant.

1. CRIMINAL LAW; THEFT; ATTEMPTED THEFT.—Where the evidence shows that the accused has already commenced to commit the crime of theft by forcing open the padlock, locking the gear-shift to a ring attached to the dashboard which was placed there to avoid the jeep from being stolen, but on account of the timely arrival of a police officer, the accused did not succeed in taking away said jeep which evidently was his purpose, the crime committed is attempted theft.
2. ID.; ID.; JUDICIAL KNOWLEDGE ON VALUE OF THING STOLEN; VALUE OF THING STOLEN, NEED NOT BE PROVED.—In cases of theft, the exact value of the thing stolen need not be proved for determining the corresponding liability it being sufficient that it be shown that it has some value, and in this particular case, this Court can take judicial knowledge that, actually in the Philippines, a jeep in running condition is worth about ₱1,000.
3. ID.; EVIDENCE; INCRIMINATORY STATEMENTS; FAILURE TO OBJECT; WAIVER.—It appearing that the supposed incriminatory statements of the offended party were made in the presence of the accused at the police headquarters and were not objected to when the police officer testified about them at the hearing, they cannot be assailed and objected to for the first time on appeal. As it is known, the right of an accused to confront and examine a witness may be waived and his failure to object to the admission of evidence at the proper time, amounts to a waiver of that right.

APPEAL from a judgment of the Court of First Instance of Manila. Gutierrez David, J.

The facts are stated in the opinion of the court.

Ramon P. Mitra and *Florendo P. Aquino* for appellant.
Assistant Solicitor General Kapunan, Jr. and *Solicitor Angeles* for appellee.

ENDENCIA, *J.:*

Arturo de la Cruz was charged in the Court of First Instance of Manila with the crime of theft. After due trial, he was found guilty of frustrated theft and was sentenced to suffer the penalty of three months and eleven days of *arresto mayor*, to suffer the accessory penalties provided by law and to pay the costs. From this judgment, he appealed to this Court claming that:

"I. The lower court erred in finding that before leaving the jeep in question, the supposed owner placed the padlock (Exh. A) connecting the gear-shift with the body.

"II. The lower court erred in finding that the accused broke the padlock (Exh. A).

"III. The lower court erred in finding that when the accused was arrested he was about to drive the jeep away.

"IV. The lower court erred in finding that the jeep in question is owned by Captain Linus (*Larmust*) M. Parker and that its value is ₱2,800.

"V. The lower court erred in admitting in evidence the supposed statements of one Captain Parker through the testimony of Detective Suan.

"VI. The lower court erred in finding the accused guilty of frustrated theft and in sentencing him to imprisonment."

The facts that gave rise to the institution of this case, as shown by the evidence, are as follows: At about nine o'clock in the night of February 10, 1946, Captain Larmust Parker of the 218th F. A. C. P. (USA) parked his jeep at Rizal Avenue, near its intersection with Raon Street, to see the movies at the Ideal theater. Before leaving the jeep, he locked with a padlock the gear-shift to a ring attached to the dashboard in order to prevent the jeep from being taken away. At about 9:40 o'clock of the same night, Sergeant Groethe of 738 MP Bn. (USA) was on duty patrolling Rizal Avenue, Quezon Boulevard and Aviles Street, for the purpose of checking army jeeps parked along said streets. While passing through Rizal Avenue, he noticed that appellant was inside a parked jeep—that of Captain Parker—and that as he (Groethe) came nearer, appellant furtively withdraw towards the jeep's back seat. Sergeant Groethe then immediately stopped and inquired from appellant what he was doing and why he was inside the jeep. Appellant offered no explanation except that he was watching the jeep for a friend and when asked who was that friend, he could not give his name but said that his friend had gone to a nearby club named Argentina Club. While Sergeant Groethe was questioning appellant, he observed that the jeep's padlock had been forced open and that lying on the floor between the front seats and the gear-shift was an iron bar. In view of these incriminating circumstances, Sergeant Groethe placed appellant under arrest and handed him over to Detective Augusto Suan of the CID Office at the Bilibid Compound, together with the broken padlock, Exhibit A, and the iron bar, Exhibit B. Immediately thereafter Sergeant Groethe turned the jeep in question over to the Provost Marshal No. 2 Motor Pool on Alvarez Street, issuing a certificate that he had impounded the vehicle, noting thereon its Motor No. 20701248, Exhibit C. Appellant was then investigated by Detective Suan and during the investigation disowned any knowledge of Exhibits A and B and claimed that he was in said jeep because he had been hired by a certain unknown colored soldier to watch the jeep though he could not mention the name of the colored soldier. He further stated that he did not know where said soldier went that night, and also declared that the colored soldier promised to pay him

(appellant) ₱5.00 for watching the jeep. While Detective Suan was investigating appellant, Captain Larmust Parker arrived at the police station to report the loss of his jeep and identified the padlock, Exhibit A, as that pertaining to his jeep, stating that it was securely locked when he left his vehicle. Parker also identified the jeep in question as the one taken away from the place where he had parked it.

During the trial of the case, appellant offered no other evidence than his own testimony. He testified that he had been hired to watch said jeep; that he had never been inside the same; that when Sergeant Groethe arrived at the place, he (appellant) was on the side-walk; that the name of the soldier who requested him to watch for the jeep was Sergeant Black; that that soldier did not promise to pay him ₱5.00 that night but that he was expecting to earn that amount for his service; that he mentioned the name of Sergeant Black to Sergeant Groethe, by whom he was arrested, as well as to Detective Suan, who investigated him; that he was a chauffeur by occupation and was working in the AFWESPAC the whole week, except on Fridays and Sundays; that he was arrested by Sergeant Groethe ten minutes after Sergeant Black left the jeep in question under his care; and that he did not notice whether the broken padlock found in the jeep was already broken or not when he took care of the jeep.

The lower court gave credence to the testimonies of Sergeant Groethe and Detective Suan, did not believe in the testimony of appellant because in its opinion his exculpatory declarations were improbable and contradictory, and found the accused guilty of frustrated theft. We have carefully examined the record of the case and are convinced that the conclusion of the lower court as to the guilt of the accused is fully supported by the evidence. Sergeant Groethe is an impartial witness and the record discloses no cause for doubting his testimony. This witness testified that he had seen the appellant inside the jeep; that when he questioned the appellant as to why he was there, the latter told him that he was watching the jeep for a friend who had gone into the Argentina Club, which friend, however, upon being further questioned, appellant could not identify; that he found the padlock, Exhibit A, already broken and the iron bar, Exhibit B, placed on the floor between the seats and the gear-shift of the jeep; that the appellant, upon being seen by him, withdraw to the back seat of the jeep; and that, in such suspicious and incriminating circumstances, he arrested the appellant.

The accused did not deny the facts testified to by Sergeant Groethe except that he had been found by Sergeant Groethe inside the jeep. Hence, we have the following

undisputed fact: that inside the jeep there had been found a padlock forced open and an iron bar. This fact, together with the weight of the testimonies of Sergeant Groethe and Detective Suan, are, in the opinion of the Court, sufficient circumstantial evidence to establish the guilt of the accused. True it is that the accused tried to explain his presence in the jeep but in this connection he gave three different versions: (1) at the time he was apprehended by Sergeant Groethe, he told the latter that he (appellant) was watching the jeep for a friend who had gone to a nearby Club being, however, unable to identify or name this friend when questioned further by this Sergeant; (2) upon being investigated by Detective Suan, appellant stated that he had been hired to watch said jeep by a certain colored soldier whom he had met for the first time on that occasion; and (3) in the course of the hearing, appellant testified that he had been requested to look after said jeep by a colored soldier named Sergeant Black whom he had previously known for quite sometime. These contradictory statements about his presence in the jeep, together with the fact that only during the trial did appellant deny having been inside the jeep in question, are more than sufficient for the Court to doubt his veracity.

It appears from the record that when Captain Parker was investigated by Detective Suan, he assured, in the presence of the accused, that padlock, Exhibit A, was intact and locked when he, Parker, parked his jeep. When Sergeant Groethe found the broken padlock inside the jeep, the only person found therein was the appellant, and in the absence of evidence showing that he was not the one who forced it open, it is reasonale to presume that he was the one who forced it open for the purpose of stealing the jeep.

However, in one of the assignment of errors, appellant argues that padlock, Exhibit A, could not have been possibly forced open by him for, according to the testimony of Sergeant Groethe, said padlock was still hanging in the gear-shift when he saw it. The fact, however, that the padlock was *still dangling* from the ring on the gear-shift not only does not conflict with the fact that it was opened forcibly, for a padlock may be already forced open and remain hanging from the ring, but on the contrary, it further proves that it was just then forced open by appellant, because at that time there was no other person in the jeep and the padlock was *still* swinging and in motion suspended from the ring.

With regard to the iron bar, Exhibit B, found on the jeep's floor, the evidence is not clear as to who brought it to the jeep, but it being a proven fact that the only per-

son seen inside the jeep by Sergeant Groethe was the accused, who withdraw to the back seat when Sergeant Groethe came close to the jeep, it is reasonable to conclude that Exhibit B was brought there by the appellant to use it to force open the padlock, Exhibit A.

The lower court found the accused guilty of frustrated theft and sentenced him accordingly. The Solicitor General holds the view, however, that the crime committed by appellant is simply that of attempted theft. There is no showing that at the time the appellant was seen by Sergeant Groethe, he was already taking away the jeep in question, but the evidence shows that he had already commenced to carry out his felonious intention, and that if he did not perform all the acts of execution which should have produced the crime of theft, it was because of the timely arrival of Sergeant Groethe at the place. Article 6 of the Revised Penal Code provides that there is an attempt to commit a crime "when the offender commences the commission of the felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance." In the instant case, the evidence, although circumstantial, satisfactorily shows that the accused has already commenced to commit the crime of theft by forcing open the padlock, locking the gear-shift to a ring attached to the dashboard which was placed there to avoid the jeep from being stolen, but on account of the timely arrival of Sergeant Groethe, the appellant did not succeed in taking away said jeep which evidently was his purpose. Hence, in the present case, the crime of theft had not reached yet the stage of frustration.

The appellant contends that the ownership of the jeep in question, as well as its value were not sufficiently established, and for this reason he cannot be convicted for theft. It is true that Captain Parker (the alleged owner of the jeep) failed to testify in this case but, in the opinion of the Court, the point raised by the appellant is immaterial for it is a fact duly proven that the jeep in question does not belong to the appellant. As to the value of the jeep, it is also true that the record discloses no conclusive evidence about it. There is, however, the testimony of Sergeant Groethe to the effect that the jeep in question is more or less worth $1,400. In cases of theft, however, the exact value of the thing stolen need not be proved for determining the corresponding liability it being sufficient that it be shown that it has some value, and, in this particular case, we can take judicial knowledge that, actually in the Philippines, a jeep in running condition is worth about ₱1,000.

Appellant also contends that the supposed incriminatory statements of Captain Parker should not have been admitted through the testimony of Detective Suan, on the ground that the latter's testimony concerning said statements is hearsay evidence. It is to be noted, however, that the questioned statements of Captain Parker were made in the presence of the appellant at the police headquarters and were not objected to when Detective Suan testified about them at the hearing, and they cannot be assailed and objected to for the first time on appeal. As it is known, the right of an accused to confront and examine a witness may be waived and his failure to object to the admission of evidence at the proper time, amounts to a waiver of that right.

The crime committed by the accused, as shown by the evidence, being attempted theft of a jeep, the value of which we may fix at ₱1,000, is penalized under paragraph 3, of Article 309 in connection with Articles 51 and 71 of the Revised Penal Code, the latter article as amended by section 3 of Commonwealth Act No. 217, with *destierro* in its maximum period to *arresto mayor* in its minimum, and as the aggravating circumstance of nocturnity, pointed out by the Solicitor General, was not duly established, appellant should be sentenced to *destierro* in its maximum degree.

Wherefore, the Court modifying the judgment appealed from, finds appellant guilty of the crime of attempted theft and sentences him to undergo the penalty of four years, two months and one day of *destierro*, and to pay the costs. Pursuant to the provisions of Article 87 of the Revised Penal Code, during the period of service of sentence, appellant is prohibited from entering the City of Manila nor within a radius of 100 kilometers from the boundaries thereof. With this modification, the judgment appealed from is hereby affirmed.

It is so ordered.

Torres and *Lim, JJ.* concur.

Judgment modified.

[No. 368–R. April 29, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* ROGELIO GABITANAN, defendant and appellant

1. PUBLIC OFFICERS; "DE FACTO" OFFICER; ACTS OF ACTING FISCAL AS A "DE FACTO," OFFICER CANNOT BE ATTACKED COLLATERALLY.— Even assuming that the appointment of the acting Fiscal in question was irregular, yet he could be considered as a *de facto* officer and not a mere intruder. As such *de facto* officer and being in possession of the office, his acts cannot be collaterally questioned, especially when there has been no abuse

of authority on his part and the accused has not been deprived of any of his rights during the proceedings.

2. CRIMINAL LAW AND PROCEDURE; INFORMATION; AMENDMENT; LIMITATION UPON RIGHT TO AMEND.—Under Rule 106, sec. 13, of the Rules of Court, an information or complaint may be amended in substance or form without leave of the court at any time before the accused pleads. The only limitation to this is that the nature of the crime should not be changed.

3. ID.; GENERIC AGGRAVATING CIRCUMSTANCE NOT ALLEGED IN INFORMATION MAY BE PROVED EVEN IF OBJECTED TO; QUALIFYING CIRCUMSTANCE MUST BE ALLEGED IN INFORMATION.—Even if objected to, the prosecution may prove a generic aggravating circumstance not alleged in the information, for the reason that this should contain only the acts or omissions constituting the offense. A qualifying circumstance should be alleged in the information because it is an integral part of the crime; but a mere generic aggravating circumstance need not be alleged and may be proven even over the objection of the defense.

4. CRIMINAL LAW; MURDER; "ALEVOSÍA" PRESENT; CASE AT BAR.—While the deceased was floating in the water and trying to approach the sailboat in order to board it, the accused fired at him without risk to his own person and with the victim at his complete mercy. No harm could possibly have come from the deceased while he was swimming in the sea. No defense at all could have been offered by him against the fatal shots of the accused. Under these circumstances, the act of the accused in firing at the deceased, constitutes *alevosía*.

APPEAL from a judgment of the Court of First Instance of Sulu. Fernandez, J.

The facts are stated in the opinion of the court.

Climaco & Climaco for appellant.

First Assistant Solicitor-General J. B. L. Reyes and *Solicitor Torres* for appellee.

JUGO, *J.:*

Rogelio Gabitanan was accused of murder before the Court of First Instance of Sulu by means of an information dated October 9, 1943.

The trial was held on October 18 to 23 1943. On November 11, 1943, Judge Enrique A. Fernandez rendered judgment convicting the accused of the crime of murder and sentenced him to suffer from ten (10) years and one (1) day of *prisión mayor* to seventeen (17) years, four (4) months and one (1) day of *reclusión temporal,* to indemnify the heirs of the deceased, Manawal Surian, in the sum of ₱2,000, without imprisonment in case of insolvency, and to pay the costs. From this judgment, the accused appealed.

The records of the case were lost or destroyed during the recent war. On April 12, 1946, the Supreme Court ordered the reconstitution of the records. Pursuant thereto Attorney Cesar C. Climaco, attorney *de oficio* of the accused, presented in the Supreme Court nine (9) docu-

ments which are specified in the writing entitled "Certificate of Correctness" dated in the City of Zamboanga, July 25, 1946, attached to the present records. The Solicitor General on August 22, 1946 filed in writing entitled "Compliance" in which he made it of record that he had no objection to the admission of the documents submitted in the reconstitution of the records of the case. On 2 September 1946, Jose de la Cruz, Commissioner for the reconstitution of records for the Supreme Court, rendered his report recommending that the case be declared reconstituted with the documents above mentioned and that it be docketed with a G. R. number, and that the appellant be ordered to file eleven (11) additional copies of his brief within fifteen (15) days from notice, and that the Solicitor General file his brief within thirty (30) days from notice. This recommendation was approved and adopted by the Supreme Court as its own on September 5, 1946. Later on this case was forwarded by the Supreme Court to the Court of Appeals for decision as coming within the latter's jurisdiction. This statement shows why the disposition of this case has been delayed.

Counsel for the appellant has filed a typewritten brief of sixty-eight (68) pages with two assignments of error on questions of law and two assignments of error on questions of fact, which are as follows:

"Assignments of Errors on Questions of Law

"I

"The lower court erred in overruling the motion to quash based on the ground that the prosecuting officer had no authority and legal personality to file the information and consequently that the trial court acquired no jurisdiction over the case.

"II

"The lower court erred in overruling the motion of the defense moving that the allegation of evident premeditation alleged in Atty. Valbuena's information be stricken out because said allegation does not appear in the amended criminal-complaint filed in the justice of the peace court.

"Assignment of Errors on Questions of Fact

"I

"The lower court erred in finding that the killing at bar was consummated under treacherous circumstances and in convicting the accused for murder.

"II

"The trial court erred in holding the accused criminally and civilly responsible for the death of Moro Manawal Surian."

Before the defendant entered his plea of not guilty the defense counsel, Atty. Cesar C. Climaco, objected to the proceedings on the ground that Acting Provincial Fiscal

Asclepiades V. Valbuena had no authority to sign the information and moved that the case be quashed under paragraph (*c*), Section 2, Rule 113 of the Rules of Court. It was contended by the defense that Attorney Valbuena had not been designated by the Commissioner or Minister of Justice to act as provincial fiscal of Sulu under the provisions of section 1679 of the Revised Administrative Code, as amended by Commonwealth Act No. 144. The motion to quash was denied by the trial judge and excepted to by counsel. To clarify the question raised, the circumstances under which Attorney Asclepiades V. Valbuena was designated acting provincial fiscal of Sulu must be briefly stated.

On 29 September 1943, the Judge of the 9th Judicial District (which includes Sulu) designated Attorney A. V. Valbuena acting provincial fiscal of Sulu in the absence of the regular fiscal Pambuan, after sending a telegram to the Department of Justice requesting that he be so designated effective 1 October 1943. The Department failed to reply to said telegram, so two others dated 8 and 15 October were sent reiterating the request. When the trial of the case was commenced on 18 October 1943, no answer had yet been received from the Department, but in order not to lose time and to avoid postponing the trial of the criminal cases which had already been set for hearing (including the present case), the Court proceeded with the trial of this case, with Attorney Valbuena acting as fiscal. The defense counsel impugned the authority of Attorney Valbuena to sign the information and to proceed with the trial, and prayed that the information be quashed on the grounds above stated. The Court denied the motion and in support of its ruling stated in open court that three (3) telegrams had been sent to the Department of Justice requesting the appointment of Attorney Valbuena as acting provincial fiscal and inasmuch as no answer had yet been received and in view of the fact that the month of October was the time designated by law for the regular court session in Jolo, and that there were fourteen or fifteen criminal cases pending trial, and believing that the Department of Justice would grant the appointment of Attorney Valbuena effective 1 October 1943, the Court was of the opinion that the trial might proceed (pp. 2 to 5, t. s. n.). The judgment of the Court was promulgated on 11 November 1943 and it seemed that as yet no answer had been received from the Department of Justice. As to the action taken by the Department, nothing appears of record except the statement contained in the appellant's brief, which is not opposed or denied by the Solicitor General in his brief, and therefore,

may be accepted in the resolution of the question raised. Said statement is as follows:

"Because of this long silence on the part of the Commissioner of Justice, the trial judge wired Manila requesting that he be allowed to proceed to the Capital for a conference regarding the designation of Atty. Valbuena. The reply of the Commissioner of Justice was (1) a denial of the request for conference and (2) a designation of Atty. Valbuena as acting fiscal, without compensation, but to act as much (such) only until Atty. Abubakar assumed office." (P. 13, Appellant's brief.)

The question to be determined is whether the designation of Attorney Valbuena as acting provincial fiscal should be considered as effective from 1 October 1943. It should be borne in mind that the request made by Judge Fernandez was for the designation of Attorney Valbuena effective 1 October 1943. When, therefore, the answer was received that Attorney Valbuena was designated to act as acting provincial fiscal until Attorney Abubakar assumed office, it seems clear that his designation had some relation with or was in response to the previous requests made, and that was the reason why the Department did not consider it necessary to set the date of effectivity as it was already implied or understood when the designation was considered in connection with the requests. Otherwise it would be necessary to conclude that the Commissioner of Justice intended to invalidate the previous acts of Attorney Valbuena as acting provincial fiscal as the Commissioner must have known that the court had already held sessions in Jolo, Sulu, and Attorney Valbuena must have acted as fiscal as there was no other available. It cannot be supposed that the Commissioner had such intention, which would have been contrary to the public interest. Consequently, we hold that the designation made by the Commissioner of Justice was effective 1 October 1943.

But even assuming that the appointment of Attorney Valbuena was irregular, yet he could be considered as a *de facto* officer and not a mere usurper. As such *de facto* officer and being in possession of the office, his acts cannot be collaterally questioned, especially when there has been no abuse of authority on his part and the defendant has not been deprived of any of his rights during the proceedings. We may cite illustrative rulings of the courts in similar cases as follows:

"A *de facto* officer is one who derives his appointment from one having colorable authority to appoint, if the office is an appointive office, and whose appointment is valid in its face. It is not necessary that an officer should derive his appointment from one absolutely competent to invest him with a good title to the office." (Ex-parte Strang, 21 Ohio St. 610, 617.)

"A valid election or appointment of a person to an office or other position at or before he enters upon his duties is not a prerequisite to his status of *de facto* officer. It suffices if he is not a mere usurper of the position he holds, and that he *bona fide* holds it under color of an election or appointment, irregular and unauthorized though it may be." (State *v.* Wayne County Court, 114, S. E. 517, 518, 92 W. Va. 67.)

"A *de facto* officer is one who is in possession of an office, and is discharging its duties under color of authority, by which is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer." (Ridout *v.* State, 30 S. W. [2d] 255, 161 Tenn. 248, 71 A. L. R. 830.)

"A deputy county clerk acting under appointment by county clerk is at least a '*de facto* officer' notwithstanding statutory method may not have been followed (C. L. sec. 7940)." (Board of Com'rs of Douglas County *v.* Madan, 5 P. [2d] 866, 867, 90 Colo. 10.)

"One who is in possession of an office in the open exercise of its functions under color of an election or an appointment is a '*de facto* officer,' even though such election or appointment may be irregular." (Propst *v.* Calhoun County Court, 106 S. E. 878, 879, 88 W. Va. 409.)

"That duly elected judge assumed office and drew petit jury on day before his term of office began held not to require reversal of conviction of person tried before jury, since judge was a '*de facto* officer,' and not a usurper or intruder. Code 1923, Sec. 2567." (Tilley *v.* State, 159 So. 498, 499, 26 Ala. App. 342.)

The appellant cites in support of his contention the case of People *vs.* Gemora, G. R. No. 46700, in which it was said:

"Under section 1679 of the Revised Administrative Code, as amended, when the Court, on January 19, 1937, appointed Attorneys A, B, and C special fiscals in the present case, it had no authority to make such appointment, because according to law it was in the Secretary of Justice to appoint an Acting Fiscal when the provincial fiscal shall be disqualified by personal interest to act in a particular case or when for any reason he shall be unable, or shall fail, to discharge any of the duties of his position. Consequently, the appointment made in favor of Messers. A, B, and C is null and void. Moreover, neither of said attorneys was duly qualified by taking the corresponding oath of office. Wherefore, they were without legal personality to lodge the information and prosecute the accused, nor has the Court acquired jurisdiction over this case. Neither can the said attorneys be considered fiscals *de facto*, because there was at the time of their appointment a fiscal *de jure* who was discharging the functions of his office."

The doctrine in the Gemora case is not applicable to the present one, for in that case the Judge appointed special fiscals when the fiscal *de jure* was available and was discharging the functions of his office, and they could not therefore be considered as officers *de facto*. Furthermore, in the Gemora case the Judge did not seek at all the authority of the Secretary of Justice who was the officer vested by Section 1679 of the Revised Administrative Code, as amended, with the power to appoint acting fiscals,

and those appointees did not take the corresponding oaths of office, which must be assumed to have taken place in the present case, in the absence of proof to the contrary. At the time of the proceedings in the Gemora case the country was under normal conditions and it was not difficult to communicate and travel between the different parts of the islands, whereas at the trial of the present case communication and travel were extremely difficult. These circumstances tend to show that the trial judge was justified in proceeding with the cases, having in mind the fact that it would have been difficult for him to return later to Sulu. The public interest should be given considerable weight in the consideration of this point. It is, therefore, held that the first error assigned was not committed by the trial court.

Coming now to the second assignment of error, the appellant contends that the Court erred in not striking out from the information upon petition of the defense, the allegation of evident premeditation, for the reason that it did not appear in the amended complaint filed in the justice of the peace court under which the preliminary investigation was held. Under Rule 106, sec. 13, an information or complaint may be amended in substance or form without leave of the court at any time before the defendant pleads. The only limitation to this is that the nature of the crime should not be changed. In Moran's Rules of Court it is said:

"As corollary to the rule that only 'acts or omissions * * * constituting the offense' should be pleaded in a complaint or information, a mere circumstance either mitigating or aggravating the defendant's criminal responsibility need not be pleaded, it not being an integral element of the offense charged. However, a qualifying circumstance which constitutes one of the essential elements of the offense, like *alevosía* in murder, should be pleaded, otherwise it should be considered merely as an aggravating circumstance, if proved. For the same reasons all the facts constituting habitual delinquency should be alleged." (Vol. II, pp. 369–370.)

The above quotation is supported by the doctrine laid down in the case of U. S. *vs.* Campo (23 Phil., 368). Even if objected to, the prosecution may prove an aggravating circumstance not alleged in the information, for the reason that this should contain only the acts or omissions constituting the offense. A qualifying circumstance should be alleged in the information because it is an integral part of the crime; but a mere generic aggravating circumstance need not be alleged and may be proven even over the objection of the defense.

In the present case there has been no change in the nature of the crime alleged in the information filed with the Court of First Instance from the crime alleged in the

complaint filed with the justice of the peace court for the purposes of the preliminary investigation. The amendment was made before the pleading in the Court of First Instance. The circumstance of evident premeditation may only be considered as a generic aggravating circumstance. Treachery alleged both in the complaint and in the information may be considered as a qualifying circumstance.

For these reasons it is held that the trial court did not commit the second alleged error.

We come now to the last two assignments of error, which may be considered together as they deal with the facts of the case, the fourth being a corollary of the third.

In the afternoon of 27 September 1943, the deceased, Manawal Surian, set sail his *kumpit* or sailboat from the municipality of Pañgutaran bound for Job. He had a crew composed of Moros Hasan, Unding, and Aspa, with a cargo consisting of coconut oil, bananas, chickens and eggs. He had a permit for such trip from the municipal authorities of Pañgutaran. At 10 o'clock in the evening of said day the *kumpit* arrived at Jolo and docked at the Chinese pier in the place called *Tindalaud*. The stores along the pier were still open. Manawal presented his permit to policeman Samad, but the latter asked him to wait for inspection the next day before discharging his cargo. The sea was getting rough. Feeling that his *kumpit* might collide with the pier, Manawal asked permission from policeman Samad to move it to a distance of about one hundred (100) yards from the pier. This permission was granted.

Manawal stayed in the boat until the afternoon of the next day. At about 1:30 p. m., of 28 September 1943, the accused, Rogelio Gabitanan, who was a policeman in charge of inspecting boats which arrived at Jolo, came to the Chinese pier to perform said function. When he saw the vessel of Manawal, he shouted to him to dock alongside the pier. Manawal answered that he could not do it because the sea was too rough and the tide was low. Gabitanan, using the *vinta* of Moro Abdul, went to the *kumpit* of Manawal. Upon reaching it he boarded it and reprimanded the latter and his companions for not obeying his order to dock at the Chinese pier, saying "You are hard-headed; why do you not obey my orders?" Manawal replied, "We are not hard-headed but we cannot dock the *kumpit* there on account of the waves and the low tide." The accused went from the prow to the mast of the *kumpit* and afterwards returned to the place where Manawal was standing. He again reprimanded Manawal and the latter repeated the answer. Offended by Manawal's answer, the accused pushed him overboard. Manawal, who emerged from the water, tried to return and

board the *kumpit* by clinging to its edge, but the accused pushed him back to the water. Manawal swam back to the *kumpit* and again tried to get on board, but the accused kicked him on the chest and he fell back. For the third time Manawal attempted to climb up the boat but the defendant had already drawn his .45 calibre revolver and fired three shots at Manawal, inflicting upon him seven (7) wounds, some of which were fatal according to the medical report. After receiving the third shot, Manawal disappeared from the surface of the sea. The accused then faced Hasan and Unding and pointing his revolver at them, asked them whether they wanted to resist, to which they answered in the negative. The defendant then fired two shots in the air. Then he ordered them to hunt for Manawal's body in the water. With the help of other people, the corpse of Manawal was recovered and taken to the Chinese pier. These facts have been established by the evidence for the prosecution.

The defendant testifying in his behalf stated in substance that two times in the morning of 28 September 1943, he ordered Manawal to dock at the Chinese pier for inspection but his orders were not obeyed. At 1:30 in the afternoon he came back and, suspecting that there was contraband in the boat, using a *vinta* he went to the *kumpit* and boarded it. As he was climbing up the vessel, Manawal held his (defendant's) right hand and right foot and tried to push him overboard. Noticing the threatening attitude of Manawal he jumped into the *kumpit*. He faced Manawal and said, "Why are you so hard-headed. Why did you not obey my order? Do you know me?" Manawal answered, "Yes, I know you are a policeman." The defendant went around the boat to inspect the cargo, returned to the place where Manawal was standing, and again reprimanded the latter for not docking at the pier. Thereupon Manawal attempted to place his right hand on the handle of the defendant's revolver but he struck aside the hand of Manawal and pushed him overboard. Manawal fell to the water, but afterwards attempted to return to the *kumpit*. The defendant pushed him back, asking him "Why, do you want to resist?" to which Manawal answered "Who are you?" Considering the threatening attitude of Manawal, the defendant took his revolver and fired a shot to scare him, but Manawal continued his efforts to board the *kumpit*. Manawal succeeded in taking hold of the left foot of the accused, but the latter jumped backward and fired at Manawal hitting him in the left arm just for the purpose of disabling him. Manawal raised his head showing a stubborn determination to fight.

For this reason, the defendant fired at the left side of his body. The accused then confronted the two companions of the deceased, Hasan and Unding, who were beginning to approach him, and pointing his revolver at them, asked them whether they wanted to resist. They answered in the negative. The accused fired two shots in the air as a sign of alarm. He then ordered the two men to hunt for the body of Manawal. With the help of other people, the corpse of Manawal was found and recovered and later taken to the Chinese pier. Upon meeting the chief of police the accused forthwith reported the incident to him.

There is no question that Gabitanan killed Manawal The defendant puts up the plea of self-defense. It is a well-known principle of law that he who alleges self-defense has the burden of establishing it. In the first place, the testimony of the defendant is uncorroborated. In the second place, it sounds rather fantastic and unbelievable. Manawal and his companions were absolutely unarmed. They did not even have a bolo. The accused had a .45 calibre revolver, which is very deadly. The two companions of Manawal were at a distance from them, and it was only Manawal who was near the defendant. It would have required an extraordinary daring on the part of Manawal to try to hold the hand of the accused and snatch his revolver. Meanwhile the two companions were absolutely passive. The version given by the accused becomes more unbelievable when he stated that after Manawal had fallen into the water and was trying to board the *kumpit*, he still wanted to fight the defendant. A man who is trying to board a vessel by holding to its edge, in front of a man with a revolver in hand, would not show a menacing attitude unless he wanted to commit suicide. It should be noticed that even after the accused had fired a shot just to scare Manawal, according to the defendant, the deceased continued with his menacing and fighting attitude. This is beyond belief.

The qualifying circumstance of treachery has been established. While Manawal was floating in the water and trying to approach the *kumpit* in order to board it, the accused fired at him without risk to his own person and with the victim at his complete mercy. No harm could possibly have come from Manawal while he was swimming in the sea. No defense at all could have been offered by him against the fatal shots of the accused.

The defendant, however, contends that the firing at the victim was only a continuation of the assault which commenced on board the *kumpit* from the time that Manawal

was pushed overboard by the defendant. However, after Manawal had fallen into the sea and was trying hard to come back to his *kumpit*, there was enough interruption of time for the defendant to have calmed down and refrained from further attack, seeing clearly that Manawal was floating in the sea and trying to approach and come up the *kumpit*. These efforts of Manawal could not have been instantaneous, but must have lasted for a sufficient length of time for the discontinuance of the attack by the defendant. When the accused fired at Manawal when the latter was in such a position, he acted with *alevosía*. In the case of EE. UU. *contra* Baluyot (40 Jur. Fil., 410), it was held:

"ID.; ID.; ALEVOSÍA EN EL ACTO DE CONSUMARSE EL DELITO.—Aún cuando una agresión mortal puede comenzar en circunstancias que no entrañen los caracteres de alevosía, con todo, sí se continúa la agresión y se consuma el delito con alevosía, puede tenerse en cuenta esta circunstancia como cualificativa del delito de asesinato.

"ID.; ID.; ID.; CASO DE AUTOS—El acusado agredió repentina e inesperadamente a su víctima, que estaba inerme, disparando contra ella un revólver. Cuando el occiso trataba de huir. fué perseguido por el acusado, viéndose obligado a refugiarse en un cuartito donde dió voces pidiendo socorro. Entonces el acusado trató de forzar la puerta de entrada, que estaba cerrada, pero no pudo conseguirlo, debido a la resistencia que ofrecía desde dentro el occiso. Sin embargo, el acusado, calculando la posición de su víctima por las voces que ésta daba disparó su revólver en la direción que las voces le indicaban. La bala atravesó la puerta y penetró en la cabeza del occiso, ocasionándole la muerte. *Se declara:* Que la agresión final estuvo caracterizada por la circumstancia de alevosía, y que el delito cometido fué el de asesinato, aún suponiendo que la agresión no haya comenzado con alevosía."

In this case there must have been more time between the act of the accused in pushing Manawal and his act of firing at him, than the time which elapsed from the moment that Baluyut commenced the aggression until he fired at the victim behind the door panel, because the victim must have run from the point where the aggression began to the place behind the door and not walked slowly and leisurely. The crime was, therefore, committed with the qualifying circumstance of treachery. There is the mitigating circumstance of surrender to the authorities after the commission of the crime without any aggravating circumstance to counteract it. The penalty imposed by the trial court is proper and it is hereby affirmed, with costs.

It is so ordered.

Lim and *De la Rosa, JJ.*, concur.

Judgment affirmed.

[No. 857-R. May 2, 1947]

DANIEL B. VELASCO, plaintiff and appellant, *vs.* MARTINA MONTEMAYOR, defendant and appellant

DIVORCE; DIVORCE LAW PROMULGATED BY THE PHILIPPINE EXECUTIVE COMMISSION NO LONGER IN FORCE.—Even supposing that the husband had proved that his wife had slandered or insulted him to such an extent as to make their living together impracticable, still divorce on that ground could not now be granted, because the executive order under which it was based, is no longer in force, the same having been repealed in 1944 by a proclamation of General MacArthur, as Commander-in-Chief of the Fil-American Army of liberation, which declares in full force and effect the laws then existing on the statute books of the Commonwealth of the Philippines. (Proclamation of October 23, 1944, 41 Off. Gaz., 148.) And our Supreme Court has already held that under the said proclamation, Act No. 2710 prevails. (Justo Baptisa *vs.* Consuelo Castañeda, 42 Off. Gaz., p. 3186.)

APPEAL from a judgment of the Court of First Instance of Pangasinan. De la Cruz, J.

The facts are stated in the opinion of the court.

Manuel L. Fernandez for appellant.
Jose Rivera for appellee.

REYES, *A., J.:*

This is an action for divorce instituted during the Japanese occupation of the Philippines. The grounds are stated in the following paragraphs of the complaint:

"3. That by the parties' own knowledge their marital life has turned out to be so unhappy and unfortunate that in most instances since their marriage discord and unharmony existed and still exist amidst and in the conjugal abode caused by the bad nature and character of the herein defendant.

"4. That this ill-fated situation which is intolerable, unbearable and shamefull to them, their children and to others from without who regard their mating not congenial but ridiculous as well, has evolved into an ugly spectacle and culminated in a peak of impatience as there was no day nor is there any specially one year before the present World Conflict up to the present on which quarrel between them has not occurred always initiated by the defendant in which innuendos, and seriously insulting, slanderous and mischievous language or words were and are uttered and hurled to and against the herein plaintiff by the said defendant.

"5. That the plaintiff and the defendant see no common mode of life now and look at each other as strangers and that no way can settle or smoothe up this irreconcileable difference between them other than a decree of divorce."

The above allegations were denied by defendant, and after trial the Court of First Instance of Pangasinan found that the evidence presented did not warrant the granting of a decree of divorce and rendered judgment, denying the same. From said judgment, plaintiff appealed.

Briefly stated, plaintiff's complaint against his wife is that the latter has made their married life unbearable by her quarrelsome disposition, and that, in their quarrels, which she invariably provoked, she used slanderous and grossly insulting language against him. Plaintiff's sorry plight is not made a ground for divorce by Act No. 2710 of the Philippine Legislature, and it is obvious that plaintiff is seeking relief under Executive Order No. 141 of the Chairman of the Philippine Executive Commission, promulgated on March 25, 1943, by authority of the Commander-in-Chief of the Imperial Japanese Forces in the Philippines, which repealed said Act No. 2710 and instituted in its place a "New Divorce Law" with eleven separate grounds for divorce. One of those grounds (the 11th), which must be the one relied on by plaintiff, reads as follows:

"11. Slander by deed or gross insult by one espouse against the other to such an extent as to make further living together impracticable."

As already stated, the trial court found that the evidence did not justify a decree of divorce. But, indeed, even supposing that plaintiff had proved that his wife had slandered or insulted him to such an extent as to make their living together impracticable, still divorce on that ground could not now be granted to plaintiff, because the executive order in question is no longer in force, the same having been repealed in 1944 by a proclamation of General MacArthur, as Commander-in-Chief of the Fil-American army of liberation, which also declares in full force and effect the laws then existing on the statute books of the Commonwealth of the Philippines. (Proclamation of October 23, 1944, 41 Off. Gaz., 148.) And our Supreme Court has already held that under the said proclamation, Act No. 2710 prevails. (Justo Baptista *vs.* Consuelo Castañeda, 42 Off. Gaz., No. 12, p. 3186.) As the legal basis for plaintiff's action has already vanished, this case must be, as it is hereby, dismissed.

Labrador and *Gutierrez David, JJ.*, concur.

Case dismissed.

[No. 249–R (L–690). May 5, 1947]

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellee, *vs.* LIBRADO SAYSON, defendant and appellant

1. CRIMINAL LAW; HOMICIDE; SELF-DEFENSE; ILLEGAL AGGRESSION; THERE CAN BE NO ILLEGAL AGGRESSION AS BASIS OF SELF-DEFENSE WHERE ACCUSED CHALLENGED THE DECEASED TO A FIGHT.—Even assuming for a moment that the deceased, at the beginning, actually attacked the accused with a bolo, but inasmuch as said attack had been stopped and the bolo taken away from him by a third person, there ceased to be any danger or hazard against which the accused would be justified in defending himself. On

the other hand, according to his own theory, he challenged the deceased to a *sport* fight. After such a challenge, any assault or aggression from the other party will not, as far as the challenger is concerned, constitute the illegal aggression which forms the basis or primordial element of self-defense.

2. ID.; ID.; ID.; SUFFICIENT PROVOCATION.—The act of the deceased in insistently asking for more wine, however unreasonable or annoying it might have been, may not be regarded as sufficient provocation in contemplation of law.

APPEAL from a judgment of the Court of First Instance of Bohol. Valdehuesa, J.

The facts are stated in the opinion of the court.

Conrado D. Marapao for appellant.

Assistant Solicitor-General Alvendia and *Solicitor Villamor* for appellee.

MONTEMAYOR, *Pres. J.:*

The defendant Librado Sayson was charged in the Court of First Instance of Bohol with homicide, and, after trial, the lower court found him guilty thereof and, giving him the benefit of two mitigating circumstances, namely sufficient provocation on the part of the deceased and lack of intention to commit so grave a wrong as that committed, he was sentenced to not less than six (6) years and one (1) day and not more than twelve (12) years of *prisión mayor*, with the accessories of the law, to indemnify the heirs of the deceased Bartolome Albolera in the sum of Two thousand pesos (₱2,000), and to pay the costs. He is now appealing from that decision.

The following facts are not disputed. On January 24, 1946, there was a family celebration in the house of Victoriano Junson, in the municipality of Loboc, Province of Bohol, on the occasion of the last prayer for the soul of the deceased Lazaro Makindang. Several friends and relatives of said deceased were at the house to help attend to the guests and to serve them food and wine, and among them were the defendant Librado Sayson, the deceased Bartolome Albolera, Isidoro Tumanda and Zoilo Apor. The defendant was in charge of serving the drinks. In the process of giving them out to the people present in the kitchen, trouble arose between him and the deceased Bartolome Albolera, culminating in blows which proved disastrous to the latter. After two successive fistic blows given by Sayson which landed on the face of Albolera, the latter dropped to the floor in a heap. Thereafter, upon examination, it was found that Albolera sustained contusions on the outer angle of his right eye, another contusion on his left cheek, and still another contusion on his upper left lip, and a lacerated wound 1–1/3 inches long, 1/2 inch wide and 1/8 inch deep on the top of his head on the right side, including a slight

fracture of the skull around the same region. This last wound and fracture produced cerebral hemorrhage, secondary, which resulted in the death of Albolera four days later.

According to the evidence for the prosecution, while the accused was serving wine to the people who were with him in the kitchen, Albolera, who had already been served, asked for more. The defendant told him that there was no more wine left and besides he already had enough, but Albolera suggested that Sayson ask the owner of the house for more. Because of this insistence, the defendant would appear to have felt annoyed and began to shout *bonó* (meaning a challenge to fight to the finish). Albolera, who was very poor of physique and very thin, answered him that no one could accept his challenge for mortal combat because of his reputation as a good fighter and also because of his youth. This seems to have angered Sayson who immediately charged upon the deceased, punching his face twice with a brass knuckle held in his right hand, as a result of which Albolera fell down to a sitting position; and Sayson, apparently not satisfied with the punishment he had already inflicted, rushed to an adjoining room and later returned to the kitchen carrying a bolo with which he thereupon struck Albolera on the top of his head on the right side. Sayson wanted to inflict another blow with the bolo, but Tumanda succeeded in wresting it from him and depositing it in a *banguera* (window shelf). Thereafter, the defendant hurriedly left the premises and went home. Zoilo Apor who was in the kitchen from the beginning and up to the time that the accused hurled the challenge to fight to the death, but later went to the waiting room or *sala*, hurried back to the kitchen when he heard the commotion, finding Albolera prostrate on the floor with a wound on his head profusely bleeding. Apor raised him up and inquired what had happened, and Albolera informed him that he had been struck with a bolo on the head by the accused.

The version given by the witnesses for the defense, however, is quite different. According to their testimony, it was the deceased who hurled the challenge to fight (*bonó*) followed by his attacking Sayson with a knife which he picked up from a table; that Sayson was able to parry or dodge the blow and that Tumanda was also able to take away the *bolo* from Albolera and place it on the *banguera;* that, thereafter, Sayson proposed to the deceased that they have a *sport* fight and that when Albolera proceeded to attack him with his fist, Sayson delivered the two blows with his bare fist with such force that the deceased was sent reeling and staggering backward, hitting his head against the stud of a door, thereby producing the wound and a fracture on the top of his head, and that as he fell to the floor, he also struck his face against the leg of a

table, thereby causing one or two of the contusions on the face already described. On the basis of this story for the defense, counsel for the appellant now contends that appellant had acted in self-defense, or that, at least, there was incomplete self-defense, and, consequently, the penalty for homicide but lower by one or two degrees should have been imposed.

The trial court, while holding the accused guilty of homicide, nevertheless accepted partly the theory of the defense in the sense that the accused never used a bolo and that the wound on the head which caused death was produced when the accused fell backward and hit his head against the stud of the door. The lower court said that this was a consequence of the two fistic blows inflicted by the accused, for which he was naturally responsible, but found in his favor the two mitigating circumstances already stated.

After a careful review of the record, we are convinced that the testimony of the witnesses for the prosecution is the more credible and that their story is more acceptable than that told by the witnesses for the defense. We cannot believe that the deceased, who was so weak and thin, would have challenged the accused, who was much stronger and younger and a reputed good fighter, to a fight, much less a mortal combat. Neither can we believe that the wound on the top of Albolera's head on the right side and the fracture in his skull could have been caused by the supposed impact of the head of the deceased against the stud of the door as he staggered and reeled after receiving the two fistic blows from the accused. The physician, who treated the deceased and later issued a medical certificate, told the court that that wound and fracture could have been caused only by a blow. Tumanda, whose testimony we have no reason to doubt despite his relationship with the deceased, positively assured the court that Sayson struck Albolera on the head with a bolo, and that Sayson was about to strike another blow with it but that he, Tumanda, succeeded in wresting it from him. Immediately after receiving the blow, and before he could fabricate a story, upon being asked by Apor who came to his aid, Albolera said that he had been struck on the head with a bolo by the accused. And in the affidavit (Exhibit 2) of the defendant, presented by the defense, although he does not admit that he used a bolo on the deceased, still he admits therein that immediately after punishing Albolera he had gone into an adjoining room and taken a bolo, ostensively to defend himself. In said affidavit, he said nothing about any attack on him by the deceased with a bolo. There may, at first blush, be some doubt or question as to the cause of the wound on the head of Albolera, because ordinarily a sharp instrument like a bolo produces a cleancut or incised wound and not a

lacerated one. But there is reason to believe that it was the blunt and not the sharp edge of the bolo that hit the head of the deceased, perhaps due to the nervousness and excitment of the apppellant.

We are also convinced that the appellant used a brass knuckle in punching the face of Albolera. This was testified to by Tumanda, and that instrument (brass knuckle—Exhibit B) was later found in the house of the appellant by a policeman and its ownership was admitted by the accused before the chief of police (p. 42, t. s. n.)

As correctly contended by the Solictor General, even if we accepted the theory of the defense, still the appellant could not successfully plead self-defense. Even assuming for a moment that the deceased, at the beginning, actually attacked the defendant with a bolo, but inasmuch as said attack had been stopped and the bolo taken away from him by Tumanda, there ceased to be any danger or hazard against which the appellant would be justified in defending himself. On the other hand, according to his own theory, he challenged Albolera to a *sport* fight. After such a challenge, any assault or aggression from the other party will not, as far as the challenger is concerned, constitute the illegal aggression which forms the basis or primordial element of self-defense.

As to the existence of the mitigating circumstance of lack of sufficient provocation considered by the trial court in favor of the appellant, we are not convinced that the same was present in this case. The insistence of the deceased that more wine be served despite the refusal or explanation of the appellant, is not, to our mind, sufficient provocation that would give rise to the application of this mitigating circumstance. We can well imagine that the deceased may have importuned Sayson with insistent requests for more wine and that this insistence annoyed and vexed the appellant and caused him to punch Albolera. But we repeat that this act of Albolera, however unreasonable or annoying it might have been, may not be regarded as sufficient provocation in contemplation of law.

In view of the foregoing, we find the appellant guilty of homicide with neither aggravating nor mitigating circumstance. The penalty should therefore be imposed to its medium degree. The maximum of the sentence should be not less than fourteen (14) years, eight (8) months and one (1) day of *reclusión temporal*. With this modification in the sentence and the findings of the trial court, the decision appealed from is hereby affirmed, with costs against the appellant.

So ordered.

Concepcion and *J. B. L. Reyes, JJ.*, concur.

Judgment modified.

[No. 700-R. Mayo 23, 1947]

EDUARDO C. GANA, demandante y apelante, *contra* THE ROMAN CATHOLIC ARCHBISHOP OF MANILA, PHILIPPINE TRUST COMPANY y P. M. POBLETE, demandados y apelados.

1. MANDATO; DEBER DE UN TERCERO QUE TRATA CON UN AGENTE DE AVERIGUAR LA NATURALEZA Y EXTENSIÓN DE LA AUTORIZACIÓN CONFERIDA AL AGENTE; LA FALTA DE HACER LA MISMA, SU EFECTO.—Cuando un tercero, que trata con un agente, sabe que el poder de éste debe de constar por escrito a fin de obligar a su principal, es su deber averiguar la naturaleza y extensión de la autorización conferida al agente y ver si éste actúa o no dentro del alcance del poder que se la ha concedido en virtud de la autorización por escrito. Si tal persona no hace las averiguaciones necesarias y opta por confiar en las manifestaciones del agente se le debe considerar como conocedor de la autorización de tal agente y su ignorancia en cuanto al alcance de dicha autoridad no le servirá de excusa; y tal culpa no podrá echarse al principal que nunca ha autorizado el acto o contrato. (Dean *contra* Pacific Commercial Co., 42 Jur. Fil.. 777.)

2. ID.; CONTRATOS; CONTRATO CELEBRADO A NOMBRE DE OTRO POR QUIEN NO TENGA SU AUTORIZACIÓN LEGAL SERÁ NULO.—Si el agente no contaba con la autorización del principal, dueño de la propiedad, el alegado contrato que aquél haya celebrado sobre ésta es nulo porque "ninguno puede contratar a nombre de otro sin estar por éste autorizado o sin que tenga por la ley su representación legal" y "el contrato celebrado a nombre de otro por quien no tenga su autorización o representación legal será nulo, a no ser que lo ratifique la persona a cuyo nombre se otrogue antes de ser revocado por la otra parte contratante" (Art. 1259, Código Civil).

3. CONTRATOS; LEY DE CORPORACIONES, ARTÍCULO 159; LA FACULTAD DE UNA CORPORACIÓN UNIPERSONAL DE SENTAR REGLAS Y REGULACIONES; LA FALTA DEL ELEMENTO ESENCIAL DE CONSENTIMIENTO.—El contrato celebrado por el agente no puede obligar al Arzobispado porque en él falta el elemento esencial del consentimiento o ratificación, que es la aprobación del Delegado Apostólico. El Arzobispado, como corporación unipersonal, tiene la facultad de sentar reglas, regulaciones y disciplina para reglamentar el sistema de adquirir y poseer bienes y de disponer de ellos, según el artículo 159 de la Ley de Corporaciones. Entre tales reglas o regulaciones está la de que en las enajenaciones de bienes cuyo valor no excede de ₱15,000, son necesarios, para la validez y eficacia de la transacción no solamente el consentimiento de las partes y la aprobación del Consejo de Finanza del Arzobispado sino también el consentimiento del Delegado Apostólico. Comoquiera que dicho Delegado Apostólico ha desaprobado la venta en cuestión, la misma no ha quedado debidamente autorizada o ratificada.

4. ID.; ID.; ID.; LAS REGLAS Y REGULACIONES DE UNA CORPORACIÓN NO DEBAN SER REGISTRADAS.—La contención de que las disposiciones del Despacho del Sagrado Concilio no obligan a terceras personas puesto que no se ha alegado ni probado que las mismas hubiesen sido registradas en el Buró de Comercio e Industria, no está bien fundada, pues la Ley de Corporaciones no requiere que las reglas y regulaciones que se mencionan en su artículo 159 deban ser registradas, no siendo las mismas parte de los artículos de incorporación.

APELACIÓN contra una sentencia del Juzgado de Primera Instancia de Laguna. Bautista Angelo, J.

Los hechos aparecen relacionados en la decisión del tribunal.

Sres. Cárdenas, Casal & Alcuaz en representación del apelante.

Sres. La O & Feria en representación de los apelados.

GUTIÉRREZ DAVID, *M.:*

Eduardo C. Gana dedujo contra The Roman Catholic Archbishop of Manila, Philippine Trust Company y Pedro M. Poblete, en el Juzgado de Primera Instancia de Laguna, una acción pidiendo que los demandados sean ordenados a otorgar a su favor una escritura de venta definitiva sobre la propiedad, descrita en el Certificado de Transferencia de Título No. 9242 expedido por el Registrador de Títulos de Laguna, de 6034 metros cuadrados de extensión, situada en Calamba, Laguna, con todas sus mejoras, previo pago de la suma de ₱1,000 como anticipo y el saldo de ₱4,500 en anualidades de ₱1,500 cada una, con un interés de 6 por ciento al año sobre el saldo no pagado, y que dichos demandados sean condenados a pagarle, mancomunada y solidariamente, en concepto de daños y perjuicios, la cantidad de ₱10,000. Los demandados, en su defensa, alegan que entre ellos y el actor no ha habido convenio definitivo sobre la venta de la citada propiedad y que la suma de ₱500 que se les había entregado por el demandante era solamente en calidad de depósito parcial y no un pago a cuenta del precio de la propiedad.

Previo el juicio correspondiente, el citado Juzgado de Laguna falló el asunto sobreseyendo la demanda, sin costas, pero ordenando al demandado, Pedro M. Poblete, a devolver al demandante el depósito de ₱500. Contra tal decisión, se ha interpuesto por el demandante la presente apelación.

Los hechos de autos, tal como están relatados en la decisión de que se apela, y con el cual relato están conformes ambas partes y este Tribunal, son como sigue:

"Hacia el mes de septiembre de 1940, P. M. Poblete, vice-presidente de la Philippine Trust Company, ofreció en venta a Eduardo Barretto la propiedad en cuestión perteneciente a la entidad The Roman Catholic Archbishop of Manila. Como el Sr. Barretto no estaba personalmente interesado en comprar el terreno lo ofreció al demandante quien se conformó en comprarlo por la suma de ₱6,000. La proposición del demandante era pagar ₱1,500 al contado y el saldo de ₱4,500 entres plazos anuales con un interés de 3 por ciento. Esta proposición lo sometió Barretto a Poblete. El 8 de enero de 1941, Poblete informó a Barretto que ya había sido autorizado a vender la propiedad de que arriba se ha hecho mención bajo el precio y condiciones mencionados en la oferta con la diferencia de que los intereses tendrían que ser al tipo de 6 por ciento al año. Poblete advirtió a Barretto que si estaba conforme en aceptar la proposición tal como

fué enmendado que se lo dijera pues daría los pasos para la preparación de los documentos correspondientes (Exhíbito C). Barretto le contestó que su comprador, el demandante, aceptaba la proposición y estaba dispuesto a hacer un depósito de ₱100 a cuenta del precio convenido, como así lo hizo (Exhíbito D). Días después Barretto hizo otro depósito de ₱400 informando a Poblete que el saldo de ₱1,000 se pagaría al firmarse la escritura (Exhíbito E). Mientras tanto, el demandante, en la creencia de que la compra estaba hecha y que todo lo que quedaba era formalizarla, preparó un plano de subdivisión del terreno para venderlo al público (Exhíbito L). El terreno fué dividido en treinta lotes con sus mediciones respectivas fijando un precio para cada lote según su medición y situación. El plan consistía en vender los lotes al contado o a plazos. Vendiéndose al contado el producto de venta ascendería a ₱12,233. Vendiendo las mejoras existentes en el terreno se obtendrían ₱3,250. Y descontando de su totalidad el costo del terreno, el demandante habría ganado ₱7,643. Vendiéndose el terreno a plazos por cinco años de plazo obtendría un producto de ₱14,610, que con el valor de las mejoras de ₱3,250, daría un total de ₱17,870. Y descontando de esta cantidad el costo del terreno, se obtendría una ganancia de ₱10,020 (Exhibit I-2).

"Como los días pasaban y no se formalizaba la transacción, el demandante pidió a Barreto se entrevistara de nuevo con Poblete a fin de que éste pudiera urgir la preparación de los papeles de venta, y en atención a su ruego Barretto se puso en habla con Poblete entregándole al mismo tiempo una carta del demandante. Esta vez Poblete contestó diciendo que si bien la transacción fué aprobada por el Consejo de Finanza del Arzobispado de Manila, ello sin embargo fué desaprobado por su Excelencia, el Delegado Apostólico, y por tanto sentía tener que informarle que la transacción quedaba cancelada. Poblete le informó además que el depósito de ₱500 hecho por Barretto estaba en su poder y estaba dispuesto a devolverlo cuando lo crea conveniente. Fué por este motivo por qué se presentó la demanda de autos.

"El demandado Poblete manifestó que si en su carta a Barretto de fecha 8 de enero de 1941, le informó que estaba authorizado a vender la propiedad de que se trata bajo el precio y condiciones que en la misma menciona fué porque recibió del Secretario-Tesorero del Consejo de Finanza del Arzobispado de Manila una carta del siguiente tenor:

'January 7th, 1941

'Mr. P. M. Poblete
'Vice President
'Philippine Trust Company
'Manila.

'Re: Property in Calamba, Laguna.

'Dear Mr. Poblete:

'With reference to your letter of December 23, 1940, in connection with the proposed sale of the above mentioned property, the Finance Council at its meeting of December 23rd has approved the sale of the said property for ₱6,000, with the initial payment of ₱1,500, provided, that the balance which will be paid in three yearly installments of ₱1,500 will bear an interest of not less than 6 per cent per annum.

'Yours very truly,

(Sgd.) REV. FR. RUFINO SANTOS
FIN Sec-Treasurer'

"(Exhíbito 1)

"Cuando recibió dicha carta, Poblete creyó que la transacción estaba aprobada por el Arzobispado de Manila y que todo lo que se necesitaba para que la misma fuese válida era la aprobación del Consejo de Finanza, y fué por este motivo porque se creyó con autorización para ofrecer en venta dicha propiedad. Pero su sorpresa fué grande cuando más tarde recibió otra carta del mismo secretario informándole que la transacción había sido sometida a su Excelencia, el Delegado Apostólico, y que éste lo desaprobó, resultado éste que sin pérdida de tiempo lo transmitió al demandante." (Págs. 12–16, Pieza de Apelación.)

El Juzgado inferior, al decidir el asunto, llegó a las siguientes conclusiones:

"Es realmente lamentable el resultado que ha tenido la transacción de marras. Tanto el demandante como el intermediario Barretto estaba en su derecho al creer que la transacción que tenían pendiente con el demandado Poblete estaba casi hecha y que todo lo que faltaba era preparar los documentos. De hecho depositaron en poder de Poblete la suma de ₱500, como pago a cuenta del precio convenido. Por lado, no es puede culpar de este inesperado desenlace al demandado Poblete que obró en el caso en la sincera creencia de que la transacción una vez aprobada por el Concejo de Finanza del Arzobispado podría considerarse como hecha. De ahí que su sorpresa fué grande cuando fué informado de que la misma no podría llevarse a cabo porque fué desaprobada por su Excelencia, el Delegado Apostólico. Esto no lo había previsto, ni lo sabía. Y, sin embargo, no se puede pasar por alto este requisito, pues resulta que en tratándose de ventas de bienes del Arzobispado de Manila cuyo valor no excede de ₱15,000, es un requisito indéspensable para su validez la aprobación del Delegado Apostólico, como se puede ver de la siguiente declaración de Su Excelencia:

> 'Es necesaria de acuerdo con el Despacho de la Sagráda Congregación del Concilio de fecha 19 de Enero de 1934 (No. 41/34; Oficio Administrativo No. 20/34)—que dice 'el Arzobispo deberá proceder en cada una de las operaciones del pleno acuerdo e inteligencia con el Padre Shanaha, con el Consejo Administrativo y con el Delegado Apostólico. En la misma fecha pero con el No. 84/34 y el sub. No. del Oficio Administrativo No. 29–34 de la misma fecha que dice 'Observando empero para la válidez de las transacciones, las prescripciones de derecho (Canon 1530, 1531) y con la condición que para toda venta y destinación o inversión del relativo precio haya preventivamente por (*a*) el consentimiento de los interesados; (*b*) el parecer favorable del Consejo Administrativo; (c) el consentimiento del Delegado Apostólico. Estas condiciones se requieren para aquellas enagenaciones de bienes cuya cuantía no exceden de ₱15,000; porque para transacciones superiores a esta última cantidad se requieren otras condiciones adicionales que no son del caso mencionado. Se repiten estos requisitos en otro despacho en 29 de octubre de 1935. No. 2181/35.' (Exhíbito 3, página 2.)

"Apareciendo que la transacción de que se trata envuelve una propiedad cuyo valor no excede de ₱15,000, resulta necesario, para su válidez, no solamente el consentimiento de los interesados o la aprobación del Consejo de Finanza del Arzobispado. sino también la aprobación del Delegado Apostólico. Como este último requisito no fué

obtenido es claro que la transacción no es válida y no obliga al Arzobispado de Manila." (Págs. 16–19, Pieza de Apelación.)

En apoyo de su recurso, el apelante alega que el Juzgado inferior incurrió en error (1) al declarar que para la validez de un contrato de compra-venta, otorgado por la corporación unipersonal, The Roman Catholic Archbishop of Manila, sobre una propiedad cuyo valor no excede de ₱15,000, son necesarios no solamente el consentimiento de los interesados, o la aprobación del Consejo de Finanza del Arzobispado, sino también la aprobación del Delegado Apostólico y al declarar que por falta de este último requisito, la transacción discutida no es válida y no obliga a dicho Arzobispado; (2) al no haber condenado a The Roman Catholic Archbishop of Manila al pago de la indemnización de daños y perjuicios reclamados en la demanda y (3) al no haber accedido a la moción de nueva vista del apelante. Pide que, con revocación de la sentencia de que se apela, se ordene a la entidad apelada, The Roman Catholic Archbishop of Manila, a que otorgue el documento de venta sobre la propiedad en cuestión a favor del apelante, y a que pague los perjuicios, declarados como probados por dicha sentencia, más las costas.

Se arguye por el apelante que Poblete había sido autorizado por la entidad apelada, The Roman Catholic Archbishop, en virtud de la carta, Exhíbito 1, firmada por el Secretario-Tesorero del Consejo de Finanza del Arzobispado de Manila, para vender la propiedad discutida bajo los términos y condiciones contenidos en dicha carta y que, apareciendo claro, específico y por escrito el mandato constituído a favor de Poblete, es indudable la facultad de éste para obligar a dicha apelada dentro de los términos de dicho mandato; que ha quedado perfeccionado el contrato entre dicho Poblete, como representante del Arzobispado de Manila, y el apelante, como así se desprende de las correspondencias, Exhíbitos A, B, B–1, C, y del pago y aceptación de los ₱500, a cuenta del precio convenido, habiendo concurrido en tal contrato todos los requisitos y elementos necesarios para su validez y eficacia según la ley; que por virtud de la venta celebrada entre Poblete y el apelante, el Arzobispado de Manila ha quedado obligado para con el apelante, no obstante la oposición del Delegado Apostólico a tal venta, puesto que dicho Arzobispado, como una corporación creada por la ley, tenía capacidad legal para enagenar la citada propiedad, porque habiendo sido el mismo Arzobispo quien había infringido las disposiciones del Sagrado Concilio referente a la necesidad del consentimiento del Delegado Apostólico para las enagenaciones de bienes cuya cuantía no excede de ₱15,000, no lo es permisible anular un acto suyo celebrado con un tercero inocente, fundándose en su misma infracción, y porque, además, las

citadas disposiciones del Sagrado Concilio no son de conocimiento público y no habiendo sido registradas en el Buró de Comercio e Industria, como era lo debido, no obligan a terceras personas; que, a lo más, tales disposiciones tienen por objeto sentar reglas interiores para controlar las actuaciones del Arzobispo sobre determinados bienes y dentro de la esfera de la Iglesia Católica; y que las mismas no se han acreditado en debida forma en esta causa, puesto que el testimonio del Delegado Apostólico sobre el particular, no es prueba válida ni de la existencia del alegado Despacho de la Sagrada Congregación del Concilio y menos de su contenido.

El punto principal que hay que resolver es el de si Poblete estaba, o no, debidamente autorizado por el Arzobispo de Manila para vender la propiedad en cuestión.

La carta, Exhíbito 1, del Padre Santos no es ningún poder para que Poblete venda la propiedad en nombre del Arzobispado. Ella solamente expresa que el Concejo Financiero, en su junta, ha aprobado la venta de la propiedad bajo los precisos términos y condiciones mencionados en la carta. No hay nada en ésta que exprese que se facultaba a Poblete para enagenar la propiedad en representación del Arzobispado. Más bien era una información sobre la resolución adoptada por el Consejo de Finanza en el sentido de vender la propiedad sujeta, desde luego, a las reglas y regulaciones de la corporación propietaria que reglamentan su sistema de adquirir bienes y de disponer de ellos.

Verdad es que Poblete al recibir dicha carta, Exhíbito 1, creyó que la transacción estaba aprobada por el Arzobispado de Manila y, por tal motivo, se creyó con autorización para ofrecer en venta la propiedad, como así se lo manifestó a E. A. Barretto, agente del apelante, en su carta, Exhíbito C. Pero este error de Poblete no puede atribuirse al Arzobispado de Manila y no se puede, por ello, obligar al mismo. Por lo demás, era deber del apelante después de recibir dicha carta, Exhíbito C, el averiguar o indagar si Poblete tenía o no la alegada autoridad para vender la propiedad en nombre del Arzobispado. No debía depender únicamente de las propias manifstaciones de Poblete en su carta. Estaba obligado a examinar la misma carta o documento de autorización que éste alegaba, o sea, el Exhíbito 1. El apelante, como abogado, no ignoraba, ni podía ignorar, que la propiedad en cuestión pertenecía al Arzobispado y que el mandato a favor de Poblete debía constar por escrito y firmado por el mandante (Artículo 21, pár. (*c*), Regla Judicial, 123). Cuando un tercero, que trata con un agente, sabe que el poder de éste debe de constar por escrito a fin de obligar a su principal, es su deber averiguar la naturaleza y extensión de la autorización conferida al agente y ver si éste actúa o no dentro del alcance del poder

que se la ha concedido en virtud de la autorización por escrito. Si tal persona no hace las averiguaciones necesarias y opta por depender de las manifestaciones del agente se le debe considerar como conocedor de la autorización de tal agente y su ignorancia en cuanto al alcance de dicha autoridad no le servirá de excusa; y tal culpa no podrá echarse al principal que nunca ha autorizado el acto o contrato. (Dean *vs.* Pacific Commercial Co., 42 Phil., 738, 748.)

El apelante, en vez de averiguar, como era su deber, si Poblete estaba debidamente autorizado para venderle la propiedad discutida, se contentó con su creencia de que éste tenía amplia autoridad para vender la finca puesto que "escribía y firmaba sus cartas como vice-presidente del Philippine Trust Company y este banco es el banco del Arzobispado" (pág. 30, t. n. t.).

Los argumentos del apelante referentes al perfeccionamiento del contrato de venta no son pertinentes al punto principal y decisivo de si Poblete estaba o no debidamente autorizado por la corporación unipersonal, The Roman Catholic Archbishop of Manila, para celebrar el citado contrato de venta. Dan por sentado el caso afirmativo. La carta, Exhíbito A, no es ninguna oferta del Arzobispado de vender la propiedad. Es sencillamente una carta de Poblete en la que preguntaba a Barretto si estaba interesado en dicha propiedad y le pedía que buscase compradores de ella. La carta, Exhíbito B, es la propuesta de Barretto de comprarla por ₱6,000 a nombre de otro. La carta, Exhíbito C, tampoco es un ofrecimiento de venta debidamente autorizado por el Arzobispado, sino, como queda dicho, es una oferta hecha por Poblete en la creencia equivocada de que él estaba autorizado para hacerla. Por el hecho de que Barretto ha aceptado tal oferta, depositando en poder de Poblete la suma de ₱500, no se ha perfeccionado ningún contrato de venta entre el Arzobispado y el apelante sobre la finca. Y si Poblete no contaba con la autorización del Arzobispado, dueño de la propiedad, el alegado contrato que aquél haya celebrado sobre ésta es nulo porque "ninguno puede contratar a nombre de otro sin estar por éste autorizado o sin que tenga por la ley su representación legal" y "el contrato celebrado a nombre de otro por quien no tenga su autorización o representación legal será nulo, a no ser que lo ratifique la persona a cuyo nombre se otorgue antes de ser revocado por la otra parte contratante" (Articulo 1259, Código Civil). El Arzobispado nunca ha ratificado semejante contrato. Antes al contrario, el mismo ha sido desaprobado.

El contrato celebrado por Poblete no puede obligar el Arzobispado porque en él falta el elemento esencial del consentimiento oratificación, que es la aprobación del Delegado

Apostólico. El Arzobispado, como corporación unipersonal, tiene la facultad de sentar reglas, regulaciones y diciplina para reglamentar el sistema de adquirir y poscer bienes y de disponer de ellos, según el atículo 159 de la Ley de Corporaciones. Entre tales reglas o regulaciones está la de que en las enagenaciones de bienes cuyo valor no excede de ₱15,000 son necesarios para la válidez y eficacia de la transacción no solamente el consentimiento de las partes y la aprobación del Consejo de Finanza del Arzobispado sino tambien el consentimiento del Delegado Apostólico (Exhíbito 3). Comoquiera que dicho Delegado Apostólico ha desaprobado la venta en cuestión, la misma no ha quedado debidamente autorizada o ratificada. Además, la parte apelante no puede ignorar la necesidad de tal requisito, pues su mismo testigo y agente (Barretto) que había gestionado la compra de la finca en cuestión, admitió en su testimonio que sabía que era necesaria la aprobación del Delegado Apostólico a la venta porque así se lo había informado Poblete (págs. 16–17, t. n. t.), confirmado así la aserción de éste al efecto de que había informado tanto al apelante como a Barretto sobre la necesidad de dicha aprobación por parte Delegado Apostólico (pág. 38, t. n. t.).

La contención de que las disposiciones del Despacho del Sagrado Concilio no obligan a terceras personas puesto que no se ha alegado ni probado que las mismas hayan sido registradas en el Buró de Comercio e Industria, no está bien fundada, pues la Ley de Corporaciones no requiere que las reglas y regulaciones que se mencionan en su artículo 159 deban ser registradas, no siendo las mismas parte de los artículos de incorporación.

Tampoco son sostenibles las contenciones de que el Arzobispo ha infringido dichas reglas y de que el Delegado Apostólico no puede anular la venta hecha a favor del apelante. No hay nada en los autos de que se puede inferir que el Arzobispo haya personalmente ejecutado algún acto en contravención a las citadas reglas o regulaciones; y es hecho acreditado que ningún contrato de venta ha quedado perfeccionado entre la corporación unipersonal, The Roman Catholic Archbishop of Manila, y el apelante, que el Delegado Apostólico ha anulado o pudo haber anulado.

Asímismo, carece de mérito la contención de que la existencia y contenido de las disposiciones del Despacho del Sagrado Concilio, referidas en el testimonio del Delegado Apostólico, no han sido establecidos por prueba competente, pues la representación del apelante no se ha opuesto ni a la toma del testimonio en deposición de dicho Delegado ni a la presentación de dicho testimonio como prueba [Artículo 29 (*c*) y 6, Regla 18.]

Por lo que queda dicho, somos de opinión de que el Juzgado inferior no ha incurrido en el primer error señalado por el apelante.

El segundo error atribuído al Juzgado inferior por no haber condenado al Arzobispado apelado a pagar los daños y perjuicios que reclama el apelante, carece de fundamento en vista de la conclusión a que tanto el Juzgado inferior, como nosotros, hemos llegado, en el sentido de que el Arzobispado no puede ser obligado por los actos de Poblete relativos al alegado contrato de venta sobre la propiedad en cuestión y tal contrato es nulo.

Por todas las consideraciones expuestas, hallando la decisión, de que se apela, ajustada a la ley y justificada por las pruebas, la confirmamos, en todas sus partes, con las costas a cargo del apelante.

A. Reyes y *J. B. L. Reyes, MM.*, están conformes.

Se confirma la sentencia.

RESOLUTIONS OF THE COURT OF APPEALS

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

EXCERPT OF THE MINUTES OF THE COURT IN BANC OF JULY 7, 1947

The Court resolved that the membership of the five divisions of the Court, pursuant to the provisions of the last parargraph of section 145–A of the Revised Administrative Code, as amended by Republic Act No. 52, shall be composed of the following:

FIRST DIVISION

Presiding Justice Marceliano R. Montemayor
Associate Justice Roberto Concepcion
Associate Justice Arsenio P. Dizon

SECOND DIVISION

Associate Justice Alex. Reyes
Associate Justice Jose B. L. Reyes
Associate Justice Jose Gutierrez David

THIRD DIVISION

Associate Justice Luis P. Torres
Associate Justice Pastor M. Endencia
Associate Justice Alfonso Felix

FOURTH DIVISION

Associate Justice Fernando Jugo
Associate Justice Manuel Lim
Associate Justice Mariano de la Rosa

FIFTH DIVISION

Associate Justice Alejo Labrador
Associate Justice Jose Ma. Paredes
Associate Justice Salvador Abad Santos

Approved July 10, 1947.

(Sgd.) JUAN O. REYES
Clerk of Court

REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

EXCERPT OF THE MINUTES OF THE COURT IN BANC OF JULY 7, 1947

The Court resolved that, in the interest of an efficient administration of justice, for all transcripts of stenographic notes, typewritten briefs or typewritten records on appeal filed with this Court, the stenographers, attorneys or parties concerned shall be required to have them bound, sewed or put together by fasteners with covers of sufficient thickness so that they may be filed without much difficulty, and they will be more convenient for handling and study.

With regards to transcripts of stenographic notes, it was further resolved that pursuant to rule 41, section 12 of the Rules of Court, the stenographer or stenographers concerned shall be required to "prepare and affix to his transcript an index containing the names of the witnesses and the pages wherein their testimony is found, and a list of the exhibits and the pages wherein each of them appears to have been offered and admitted or rejected by the trial court."

Approved July 10, 1947.

(Sgd.) JUAN O. REYES
Clerk of Court

DECISIONS OF THE PEOPLE'S COURT

PEOPLE'S COURT
MANILA
FIFTH DIVISION

[CRIMINAL CASE NO. 160. FOR TREASON]

PEOPLE OF THE PHILIPPINES, plaintiff *versus* MIGUEL M. MORENO *alias* CAPTAIN MORENO, accused

DECISION

BORROMEO, *J.:*

This decision is rendered on the merits of a case of importance tried in the City of Zamboanga for six consecutive days during the month of February, this year; and the defendant to stand charged herein with the crime of high treason, is Miguel M. Moreno, *alias* Captain Moreno.

To substantiate the charges, the learned prosecuting attorney representing the State, Special Prosecutor Ignacio Debuque, brought to the court fifteen competent eye-witnesses, whereas the counsel for the defense placed on the witness stand nine including the defendant, plus the testimony of the defender himself in an effort to upset the evidence for the prosecution.

Miguel M. Moreno, the defendant in the present case, as he appears on the record, is not a person belonging to the vulgar kind of people. A vigorous man and fine-looking, 43, married, good English and Spanish speaking, a Spanish mestizo born in Quingua, Bulacan, and a Filipino citizen from birth as per his own admission, he is well known in Zamboanga for his notorious feats. As disclosed from the defendant's own testimony, at the outbreak of the war he was serving sentence since 1935 in the Penal Farm of San Ramon, City of Zamboanga, having been convicted for the crime of grave threat and sentenced to 18 years imprisonment by the Supreme Court on appeal from a decision of the Court of First Instance of Bohol. Sometime thereafter, he claims, at about the end of December, 1941, he was paroled by the President of the Commonwealth, conditioned that he would not commit again any other crime, and the papers were received in San Ramon in 1942. He continued staying in that institution with his family even after he was released on parole, and then, when the enemy occupied Zamboanga, from a convict prisoner as he was

for years, he rose to the highest position in that penal institution becoming a Japanese trustee official who assumed absolute control of the whole colony in such a way that the Superintendent thereof was converted into his mere subordinate. According to the evidence for the prosecution, he was the commander of the *Kaigun Juitai*, a military organization of Filipino soldiers created by the defendant himself and sponsored by the Japanese which was attached to the Japanese Navy police of Zamboanga, and as such, he was known as Captain Moreno. Defendant admits that presently he is serving sentence in the same institution for life imprisonment, the Court of First Instance of Zamboanga having convicted and sentenced him to death for the crime of murder, but the Supreme Court commuted the penalty by virtue of a dissenting opinion of one of the ten justices partaking in the decision.

The information filed by Special Prosecutor Emmanuel Pelaez on January 2, 1946, is reproduced *in toto* as follows:

"The undersigned Special Prosecutor accuses Miguel M. Moreno, *alias* Captain Moreno, of the crime of treason under article 114 of the Revised Penal Code, committed as follows:

"That during the period from July, 1942 to March, 1945, at the places hereinafter designated within the jurisdiction of this Court, the accused, being a person owing allegiance to the United States and the Commonwealth of the Philippines and not being a foreigner, did then and there wilfully, unlawfully, feloniously and treasonably adhere to the Japanese Military Forces in the Philippines and the Empire of Japan, then enemies of the United States and the Commonwealth of the Philippines, giving them aid and comfort in the manner herein, specified, to wit:

"1. That during the period from July, 1942 to March, 1945, in the province and City of Zamboanga, the accused, with intent to give aid and comfort to the enemy, did then and there voluntarily and unlawfully render service to the Japanese Army and Navy, first as a mechanic, then as a spy and informer and later as *Captain* and head of the *Kaigun Juitai*, a military organization created by and attached to the Japanese Naval Intelligence and still later as *Commander of the San Ramon Penal Colony* and the *Zamboanga Outpost Sector* under the authority of the Japanese Naval Garrison at Zamboanga; and while serving the enemy in said positions, did then and there wilfully and treasonably bear arms against the forces of the United States and the Commonwealth of the Philippines by leading numerous armed patrols and engaging guerrillas and guerrilla sympathizers;

"2. That on or about November 16, 1943, at the municipality of Patalon, Province of Zamboanga, the accused herein, with intent to give aid and comfort to the enemy, and with the help of more than three armed soldiers of the said *Kaigun Juitai* under his command, to insure impunity, with treachery and with intent to kill, did then and there maltreat, kick and shoot Otto Gale, who was then unarmed, as a result of which, the said Otto Gale received mortal wounds in the upper right arm and in the stomach from which he would have died, but for the fact that the next day he died from another cause, namely, arson perpetrated by the accused; and did then and there likewise wilfully, criminally and with intent to kill,

fire his revolver at Mrs. Otto Gale, both acts having been perpetrated by the accused in the dwelling of the offended parties;

"3. That on or about November 17, 1943, in the same municipality, the accused, with intent to give aid and comfort to the enemy, did then and there with the help of more than three (3) armed soldiers of the said *Kaigun Juitai* and of Japanese soldiers, fire his revolver upon, and did order the said soldiers to fire their rifles and machinegun, as in fact they did fire upon and machinegunned the house of Otto Gale; did then and there order Mrs. Otto Gale, Dr. and Mrs. Eduardo del Rosario, Fred del Rosario, 7 years of age, Nene del Rosario, 5 years of age, Cristino Jeronimo and Andres Fabian, then inside the house, to come down; did then and there, with intent to kill, order each one of them to be shot and killed, as in fact they were shot and killed by one of the soldiers of the accused; did immediately thereafter, with intent of gain and without the consent of the owners thereof, loot and take away from the said house, clothing, jewelry, three (3) bicycles, two (2) automobiles and other personal belongings; and did then and there unlawfully and criminally set fire to the said house, as well as seven (7) other small houses in the area, the accused knowing the said houses to be occupied at the time by one or more persons, as a result of which, Otto Gale who was then inside the said house, was burned to death; and all of said houses, being worth more than ₱6,000, were destroyed; all of the foregoing acts having been committed by the accused with treachery and evident premeditation, with the aid of armed men whose presence insured and afforded impunity, and in utter disregard of the sex and age of the offended parties and in their dwelling place; and that said acts were committed by the accused because he suspected both Otto Gale and Dr. Del Rosario of having been connected with the guerrillas;

"4. That on or about December 2, 1944, at the San Ramon Penal Colony, Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, and with treachery, evident premeditation and intent to kill, did then and there unlawfully and feloniously execute in public Paciano de los Santos, Moro Guma and an unknown Moro, whom the accused suspected as guerrillas, by beheading them one by one with a Japanese Samurai sword, in the presence of the officials and employees of the said penal colony whom he had ordered to witness the said execution.

"5. That on or about the 6th day of October, 1944, at Tetuan, Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did then and there turn over to the enemy Teodomiro A. Bucoy, Lt. Cruz and one other unknown person, all of whom had been apprehended by the accused for being guerrillas, and did order the soldiers of the said enemy to execute, as in fact, they did execute the said persons by beheading and bayoneting them;

"6. That on or about April 22, 1944, at Labuan, Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did lead an armed patrol composed of sixty (60) Japanese soldiers and twenty (20) members of the *Kaigun Juitai*, for the purpose of seeking out and apprehending guerrillas and did then and there arrest Eulogio Biel, Dionisio Biel, and Enrique Fargas, on suspicion of being runners for the guerrillas, binding their hands and taking them away to the Japanese Garrison, and did put to death the said Eulogio Biel and Dionisio Biel;

"7. That in or about the month of September, 1944, at the San Ramon Penal Farm, Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did then and there apprehend Ernesto Loriano, the father of Ernesto Loriano, Domingo de los Santos and Jesus Macrohon, and did then and there unlawfully and criminally torture the said persons, whose hands were tied behind their backs, by beating them up and having electric current run through their bodies, for the purpose of making them give out information regarding guerrillas, the said torture and grilling having lasted for three (3) or four (4) hours a day for about a week;

"8. That in or about the last week of September, at the same place, the accused, with intent to give aid and comfort to the enemy and with treachery, evident premeditation and intent to kill, did then and there behead Jesus Macrohon with a Japanese Samurai sword, for being suspected as a guerrilla;

"9. That in or about the month of December, 1944, at the same place, the accused herein, with intent to give aid and comfort to the enemy, did apprehend Camilo Fargas, on charges of having furnished food and supplies to the guerrillas and did, thereafter, torture him by beating him up and having an electric current pass through his body, for the purpose of eleciting from him information regarding the said guerrillas, and did confine him and deprive him of his liberty for three (3) months;

"10. That sometime in February 11, 1944, in a place called Bungus in the Lamitan Basilan District, Province of Zamboanga, and within the jurisdiction of this Court, the accused herein with intent to give aid and comfort to the enemy, and leading a patrol of armed Japanese soldiers and armed members of the said *Kaigun Juitai*, did then and there surround and search all the houses of the locality, and did then and there compel the inhabitants thereof to come down and did then and there question them regarding the whereabouts of guerrillas, particularly a guerrilla named Ramon Nunal; and did then and there beat up Agustin Nunal; and immediately thereafter, the accused, with intent to kill and with treachery did then and there order Prudencio Nunal, Raymundo Nunal, Agustin Nunal, Claro Nunal, Venancio Ventura and Agustin Larracochea to be herded into a nearby bush and did then and there order the soldiers to fire upon the said group, as in fact, they did fire upon them, as a result of which Agustin and Claro Nunal died instantly and Venancio Ventura, Agustin Ventura, Agustin Larracochea and Victor suffered serious physical injuries;

"11. That on or about October 15, 1943, at a place called Sinunog, Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, then leading a patrol of fifty (50) armed members of the *Kaigun Juitai* and armed Japanese soldiers, did then and there arrest one Mendoza and his male servant, charging them with being guerrillas, and did then and there, with treachery, have them beheaded;

"12. That on or about September 18, 1944, at the same place, Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did then and there arrest and take away Felipe Zerda on charges of having passed information and foodstuff to the guerrillas and did on October 21, 1944, at the San Ramon Penal Colony, have the said Felipe Zerda killed;

"13. That during the period from July, 1943, up to May 6, 1944, on the dates and at the different places hereinafter specified, all in the Province of Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did

then and there bear arms against the forces of the United States of America and the Commonwealth of the Philippines by leading armed patrols against detachments of the 121st Infantry Regiment, 10th Military District, USAFFIP, for the purpose of destroying them and breaking up their resistance against the enemy, as follows:

"(*a*) That on or about September 1, 1943, the accused did then lead an armed attack against the said armed forces of the United States of America and the Philippines, at the sitio of San Roque;

"(*b*) That on or about September 4, 1943, the accused again did lead an armed attack against the same guerrilla forces at the municipality of Mabuhay and its vicinity;

"(*c*) That on or about September 11, 1943, the accused did then lead an armed attack against the same forces in the same municipality of Mabuhay and its vicinity, taking along with him men, women, and children charged with having helped the guerrillas;

"(*d*) That on or about the same date, the accused did then lead an armed patrol and raided a place called Sinunog, rounding up and killing civilians and burning their houses in their effort to secure information about guerrillas;

"(*e*) That on or about September 27, 1943, the accused did then lead an armed attack on the same forces at the municipality of Mabuhay and its vicinity;

"(*f*) That on or about November 1, 1943 the accused did then lead an armed patrol in an attack against the aforesaid guerrillas at a place called Capisan, where the headquarters of the said guerrillas were located, and did then and there destroy, burn and loot every house in the vicinity as well as a radio station of the said guerrilla forces; and did then and there take a large number of civilians who were tortured and beaten up to elicit information from them regarding guerrillas;

"(*g*) That from November, 1943 to March, 1945, the accused led repeated armed patrols and attacks, at least once every 10 days, against the headquarters of the said guerrilla forces at Malayal and Lubuan, on the occasion of which attacks, the accused and his men arrested and beat up inhabitants therein, on charges of being friendly to the guerrillas;

"(*h*) That on or about May 6, 1944, the accused, with intent to give aid and comfort to the enemy, led an armed patrol of 200 Japanese and *Kaigun Juitai* troops which landed at Lumbang-lumbang, and did, with the said armed patrol, under his command, raid, loot, burn and destroy the barrios of Wari-wari, Ojing, Pena and other places in the Guruan District, apprehending and killing innocent civilians on charges of being guerrilla sympathizers;

"15. That in or about the early part of August, 1944, at Lamitan, Zamboanga, and within the jurisdiction of this Court, the accused, with intent to give aid and comfort to the enemy, did then and there unlawfully and criminally torture Daniel del Rio, Candido Cabrera, and Toribio Timonel, all guerrillas, by beating them up and, with their hands tied, having them strung up until only their toes would reach the floor, and did thereafter cause the said men to be executed, as in fact they were executed by Japanese and *Kaigun Juitai* soldiers;

"16. That in or about the months of October and November, 1944, at the San Ramon Penal Colony, the accused did then and there deliver speeches saying that the Americans were never coming back,

that he would cooperate with the Japanese to the end, and urging everyone to cooperate with and follow the orders of the enemy;

"17. That in or about the months of July and August, 1943, the accused, with intent to give aid and comfort to the enemy, did lend an armed patrol of *Kaigun Juitai* and Japanese soldiers in the Island of Basilan, Province of Zamboanga, did drive out the guerrilla forces in that island and did secure Japanese domination over the island with his armed troops."

Count 4 charging Miguel Moreno with having beheaded with a Japanese sword three persons; namely, Paciano de los Santos, Moro Guma and an unknown Moro, was withdrawn from the record on petition of the special prosecutor before the defendant's arraignment, on the ground that said defendant had already been convicted for murder on this overt act in the Court of First Instance of Zamboanga.

In answer to the information, the defendant entered the plea of not guilty upon his arraignment on February 14, 1947.

At the outset of the trial, the counsel for the defense petitioned the Hon. Florentino Saguin, one of the presiding trial judges, to inhibit himself on the ground that he having tried and convicted the herein defendant in a criminal case for murder when he presided over the Court of First Instance of Zamboanga, his bias and prejudice against the defendant was an inability for him to seat in judgment of the present case.

After hearing the arguments, the associate judge concerned overruled the petition, with the remark that there being no legal ground for his retirement, he was duty bound by law to go on with the case.

As an addendum to support the ruling, we deem it wise to adduce the following arguments, and out of consideration to the distinguished counsel for the defense:

Section 7 of the People's Court Act, Commonwealth Act No. 682, disposes:

"No judge of the People's Court may disqualify himself or be disqualified except in accordance with the provision of existing laws or where the accused in a case had intervened in any previous appointment of the judge to any position in the government service."

The grounds of disqualification are, therefore, statutory. Rule 126, section 1 of the Rules of Court provides:

"No judge or judicial officer shall seat in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, computed according to the rules of civil law, or in which he has been executor, administrator guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record."

In the case at bar, the only ground for the petition to have the Hon. Florentino Saguin disqualify himself is his alleged bias or prejudice for the mere fact that he had tried and convicted the defendant herein for murder in the Court of First Instance of Zamboanga. It is to be noted, however, in fairness to the defense, that the overt act alleged in the information of the present case under count 4, is the same by which the defendant was convicted for murder in the criminal case referred to. Again, it should be understood, in fairness, too, to the prosecution, that the overt act under count 4 was stricken out from the information even before the arraignment of the defendant, upon petition of the special prosecutor, on the basis precisely that the defendant had already been convicted of this crime.

There is, nevertheless, no merit in the assertion of the counsel for the defense. No prejudice on the part of the judge is in fact shown, and the record by no means bears out the assumption that there was in fact bias or prejudice in any wise.

In Williams *v.* Robinson, 6 Cush. Mass., 533, it was held that "conscious bias or prejudice in favor of one of the parties or against the other, caused by hearing an ex-parte statement of the facts of the case, is an inability or disability to try the case within the just meaning of the statutes. It was not necessary that the statutes should enumerate all the disqualifications of the standing justice. The rules of the common law and the principle of natural justice are to be applied in the construction of these statutes."

In Dais *vs.* Torres and Ybanez, our Supreme Court held that "Although a judge may not have been disqualified under section 8 of the Code of Civil Procedure (identical to Rule 126, section 1 of the Rules of Court), nevertheless, if it appears to the appellate court that the appellant was not given a fair and impartial trial because of the trial judges' bias or prejudice, said court will order a new trial, if it deems it necessary, in the interest of justice."

The mere fact, however, that a judge had theretofore tried on a defendant for a crime, is not a valid ground to disqualify him from trying another cause on same defendant. Thus, a defendant accused of murder, for instance, tried and convicted by a judge, cannot raise objection to his qualifications if he faces another charge before the same judge. In the case decided by the Supreme Court cited above, our highest tribunal does not regard bias or prejudice as a ground for disqualification. It merely held that it may be made ground for new trial in the interest of justice, if it appears, after a careful examination of the case, that bias or prejudice of the trial judge against the

accused is reflected in his decision. In other words, bias or prejudice may be a ground for a new trial if such an element, as a matter of fact, had influenced the judge in his judgment; but is not, as a matter of law, a ground for disqualification.

In the case of Joaquin *vs.* Barretto, 25 Phil., 281, our Supreme Court said: "Considering the fact that he was not disqualified, by virtue of the provisions of said section 8, from trying the case, it was his duty to go forward with the trial. It being, therefore, his legal duty to proceed with the trial, a reversal of the judgment upon the ground that he did proceed, would be unwarranted."

"The grounds for the motion of reconsideration do not constitute a legal cause for the disqualification of a judge," said the Supreme Court in the case of Benusa *vs.* Torres, 55 Phil., 740. "Section 8 of the Code of Civil Procedure (identical to Rule 126, section 1 of the Rules of Court) does not mention them, and it is not clear, according to North American Jurisprudence, that prejudice is a ground for inhibition, in the absence of an express provision of the law to that effect." (15 R. C. R., 539.)

The overt acts substantiated on record by the evidence for the prosecution, out of the seventeen counts in the information, are those under counts 1, 2, 3, 6, 10, and 15.

Count 1 deals on the general allegations of adherence to the enemy by the defendant and is proved by the following facts disclosed from the aggregate evidence for the prosecution:

1. The defendant, Miguel Moreno, was the commander of the *Kaigun Juitai*, a military organization of his own creation patterned after, and attached to, the Japanese Naval Police of Zamboanga, wearing a 45 caliber revolver, a Japanese saber, a *caborrata* and uniform consisting of a blue denim shirt and pants and an olive green cap with an anchor at the front. On the left breast he had a brass rectangle with Japanese characters. He also was bearded, and the people were familiar with his face, and he wanted to be called as in fact he was known as Captain Moreno because of his being the head of the *Kaigun Juitai*.

2. As such commander of the *Kaigun Juitai* soldiers, he conducted campaigns and led patrols against guerrillas and guerrilla suspects. The people branded him with the title of "Terror of Zamboanga." He caught, investigated, tortured and killed persons in an effort to extract from them information regarding the resistance movement and its activities.

3. He believed in the invincibility of the Japanese armed forces and issued propaganda advising the guerrillas to surrender, a sample of which is a manifesto calling them to yield to the Japanese, Exhibit B, signed by the defend-

ant as "Captain Miguel Moreno, Commander, *Kaigun Juitai.*"

OVERT ACTS PROVEN UNDER COUNTS 2 AND 3

The incident of Patalon in the evening of November 16, 1943, and the tragic extermination of the Gale family on the following morning, are related on the record by three eye-witnesses, namely Ramon Alvarez, a prominent resident of Zamboanga, merchant by occupation, Elena Casungcay, a survivor maid of the Gale family, and Blas Francisco, another survivor servant. Here are the facts:

Otto Gale, a German-born Filipino citizen, owned a large farm 30 kilometers distant from the center of Zamboanga City, called Patalon Coconut Plantation. His family was composed of the following persons: Otto Gale; his wife, Ines; their daughter, Heddy; her husband, Dr. Eduardo del Rosario; and children, Nene, 8 years, and Fred, 5. The family had three maids named Alejandra and Gorgonia and prosecution witness Elena Casungcay, and a servant named Blas Francisco, another witness.

Ramon Alvarez was a close friend to the Gale family and used to visit them at Patalon. On November 16, 1943, he happened to be visiting at Gale's home in the afternoon, accompanied by his little daughter, Olimpia. Upon arriving there, he was met by Mrs. Heddy del Rosario, who told him that if he had not come, she would have called for him. Heddy was noticed to be excited because some moments ago an individual had brought a missive addressed to Dr. Del Rosario purported to have come from Lt. Berenguer. The lady brought Alvarez to the canteen where her husband was, and Dr. del Rosario handed Alvarez the note which the latter read, conceived in these terms: "I would like you to come here at Cadalogan at 6 a. m. sharp, for a conference. In coming to that place just come alone." Signed, "Berenguer, 1st Lt. Inf."

Alvarez felt nervous for he had strong suspicion that the note was fake and a trick of Moreno, in fact the one who brought it was an individual named Ernesto, known to him as a nephew of Moreno, and he knew that Lt. Berenguer could not have been in the City of Zamboanga at that time. His fear was intensified by the consideration that the Patalon plantation was giving the guerrillas ₱150 a month, medicines, coffee and other stuffs for their subsistence, and some members of the Resistance used to visit that house; and Moreno, on the other hand, was the captain of the *Kaigun Juitai,* a military organization of Filipino rifle armed soldiers sponsored by the Japanese, wearing uniform, arm and sword, and during that time he was very much feared by the people for he could do anything he wanted to under the auspices of the Japanese, and among

his activities were making investigations and apprehending members of the Resistance. Alvarez advised Heddy not to answer the note and to have a sailboat prepared in order to leave the place at any rate.

In the midst of their worries, Gale requested Alvarez to stay and sleep with them, so he decided to remain there for the night with his daughter. After supper, a voice was heard from the yard calling for Dr. del Rosario. Alvarez saw two men outside in blue denim (maong) uniforms, the type worn by members of the *Kaigun Juitai.* Gale inquired, "who is that?", and the man calling outside answered "de arriba," pretending that they came from the mountains. The scared people inside the house gathered in the living room including Alvarez. The time was exactly 10:05, as pointed out by Heddy in looking at her wrist watch. Gale went down followed by his wife and a maid bringing a kerosene lamp, witness Elena Casungcay. Alvarez crawled and followed them, too. He was told by Mrs. Gale to follow her husband. When they were already downstairs, Moreno, the defendant herein, wearing beard, appeared before Gale asking for Dr. Del Rosario, and Gale answered he was not in. Moreno ordered Gale to go out of the gate but Gale refused, so Moreno slapped him. During the discussion, Moreno shot his interlocutor twice with his revolver after asking Gale why he was helping the guerrillas, which was denied by the latter. Gale fell down, hit on the left arm and the leftt side of the abdomen. At this juncture, Alvarez jumped outside of the barbed wire fence, and saw a flashlight from the place where Gale fell. He heard many shots rapid-fire. Other shots were fired by Moreno and his men directed towards the house, after which they left the place on board a truck. After the firing ceased, Mrs. Gale, Elena Casungcay and the other people of the house picked up the wounded Gale and brought him upstairs where first aid was given.

On the following day early in the morning, Heddy ordered the disposition of the auttomobile to conduct her wounded father to the hospital. But Miguel Moreno, at about 6 o'clock in that very morning, November 17, unexpectedly came back with his *Kaigun Juitai* men all in uniforms and armed with rifles. Upon arriving there at a certain distance of the house, they immediately fired shots, the bullets directed in all directions to the upper and lower stories of the Gale residence. When this promiscous shooting took place the following persons were inside the house: Otto Gale and his wife, Ines; Dr. Eduardo del Rosario and his wife, Heddy; their two children, Nene and Fred; three maids of the house, Alejandra, Gregoria and Elena Casungcay; Blas Francisco, a servant; and Ramon Alvarez and his daughter, Olimpia.

Immediately upon hearing the first volley of shots, Alvarez took his daughter and both fled from the house to hide in a nearby place. Elena Casungcay and Blas Francisco fled also when they heard the firing begin, and they were not hit by the bullets. Blas Francisco was hiding outside the fence in a river bank. Elena was in the garden. Alvarez and his daughter were hiding near a brook about 30 meters away from the shooting place. These three witnesses perfectly saw the scene and recognized Captain Moreno, the herein defendant, and his men. During the shooting, cries of people inside the house were heard calling for Moreno to stop firing. The shooting continued, nevertheless, until all the cries were no longer heard. Then Moreno and his men entered and ransacked the Gale residence, and upon his order, the *Kaigun Juitai* men took away trunks, bicycles, clothing, two automobiles, one belonging to Gale and the other to Dr. Del Rosario. As soon as they finished looting the house and took all they wanted, Moreno shouted, ordering his men: "Burn the house . . . these people are giving help to the guerrillas." Then the soldiers, with torches of dried coconut leaves and palms taken from the road set fire to Gale's residence. The neighboring houses were also burned, such as the dispensary of Dr. Del Rosario, the canteen and six small houses of the farm hands. With the exception of Alvarez, his daughter Olimpia, Elena Casungcay and Blas Francisco, none of the members of the Gale family was able to go out.

A few minutes after Alvarez had seen the houses burning, he took a vinta with his daughter to leave the place where he was hiding. After the burning, Elena Casungcay fled to Milnao to the house of a friend. On the 19th, Alvarez came back to Patalon and saw the buildings razed down, and there he saw the corpses, wounded and partly burned, of Cristino Geronimo and Andres Fabian, laborers of the Patalon coconut plantation. He also saw many burned bones and several skulls. Elena Casungcay who returned to Patalon a week later, saw bones among the debris, but did not see skulls.

AS TO COUNT 6

From the testimony of Mamerto de Leon, Patrocinio G. Vda. de Biel, Agueda Vda. de Biel, Romula Biel and Fermin Filoteo, the following facts have been established:

On 22 April, 1944, in the morning, a group of Japanese soldiers and Filipinos of the *Kaigun Juitai,* all armed with rifles and machine rifles and bayonets, led by the herein defendant known as Captain Moreno, was seen by the prosecution witnesses passing through Labuan on their way to Tuburan, both places under the jurisdiction of the City of Zamboanga. Beared Moreno carried with him a .45

cal. revolver, a Japanese sword, a binocular telescope and a *caborrata,* dressed in *maong* uniform like his men of the *Kaigun Juitai,* wearing cap with anchor insignia and breast-plate with Japanese characters. At about 3 o'clock in the afternoon, the patrol came back to Labuan. They were around 40 Japanese and 10 Filipino soldiers with Miguel Moreno as their leader. The house of Mamerto de Leon was surrounded and Moreno came up and pointing his revolver to De Leon, asked for his radio. Meanwhile, the soldiers tied him up and ransacked the house. After taking his belongings and throwing them through the window, he was untied and told to sit beside Moreno on a bench. Moreno then asked him what he knew of the Biel brothers, and de Leon answered that they were just engaged in the buying and selling vegetables business. Moreno inquired if there were bandits (guerrillas) around, but De Leon assured him there were none because that place was a neutral area far from the guerrilla zone. Then Moreno informed him that the Biel brothers were suspected of having given aid to the guerrillas. After questioning him, he was brought around the place and tied again with both of his hands at the back. He was brought around because they wanted to apprehend the volunteer guards whose names appeared in the list they had found. Thereupon he was brought to the seashore near a chapel which was burned by them on that occasion, and right there Moreno informed him that they apprehended three men and that all of them would be finished. From there they proceeded back to de Leon's home where the latter was left behind, but Moreno hinted to him that he was going to get the Biel brothers and that if they would not return in three days they should be regarded as dead. The patrol then proceeded to the house of Eulogio Biel.

At the house of Eulogio Biel in Labuan, Moreno was met by the wife of Eulogio. Then Moreno inquired into the whereabouts of her husband. Eulogio Biel was there, so when he appeared before Moreno, the latter shouted to his men to tie him up. With the hands bound behind his back and the rope tying him up to his neck, Eulogio was brought near a coconut tree, and Moreno made a remark that he was a bad man by supporting guerrillas. Thereupon, they proceeded to the house of Dionisio Biel, only 15 meters distant from his brother Eulogio's house, and then Moreno went up to take Dionisio downstairs, whose hands were also tied upon his order by his men. Two Japanese soldiers together with Moreno inspected the house looking for some matters about the guerrillas. Thereafter, Moreno ordered other soldiers to get Enrique Fargas, whose house was about 20 meters distant from Dionisio's. Fargas was then taken down and upon arival, was questioned

whether he saw guerrilla soldiers passing by. As Fargas denied having seen any guerrilla, Moreno hit him with his *caborrata* on the forehead and Fargas staggered and his face was littered with blood. Moreno ordered a soldier to tie him up with both of his hands at the back of his body. Fargas thus tied, Moreno ordered a soldier to bandage his forehead. Lastly, the three apprehended persons were taken by them on a truck bound for San Ramon Penal Farm.

When Dionisio Biel was apprehended at his house, his niece Romula Biel happened to be there and saw the incident like the wife of Dionisio. During his short stay at that house, Captain Moreno was acting with arrogance, according to this girl. He called and asked her to get a seat and to sit beside him. During the search of the house, he found letters from her boy-friend, so he told her to cut off relationship with him. Moreno met also the young lady at her grandmother's house in Zamboanga on a certain occasion after the apprehension of the Biel brothers and Fargas, and Moreno told her that the fate of her uncles depended upon her in that if she would accede to his desire, her uncles would be released, but she replied that dead or alive she would never yield.

Fermin Filoteo, a merchant resident of Zamboanga City, learned the incident that happened in the afternoon of the 23rd of April, 1944, through the son of Dionisio Biel and his niece, Romula Biel. He was appraised of the event that took place the preceding day and furthermore was informed that his brothers-in-law, Dionisio and Eulogio Biel were brought to San Ramon Penal Farm by Moreno and his men in the afternoon of the preceding day. Consequently, he went to the city to look for Captain Moreno and asked him about his brothers-in-law, as Moreno was considered to be his good friend. It was the 25th of April, 1944, when he met the herein defendant at his house. He asked him if his brothers-in-law were still in San Ramon, and Moreno answered affirmatively, so Filoteo requested him to help save his brothers-in-law, and Moreno answered that he would try to do so. Moreno informed him that the Biels were arrested because they were playing double-cross, having connection with the guerrillas and at the same time, playing ball with the Japanese. On 28 April, 1944, Filoteo saw Dionisio and Eulogio Biel and Enrique Fargas on a truck, escorted by Japanese soldiers and bound for the city hall building of Zamboanga City, which was then used as the headquarters of the Japanese Navy. They were all tied when they entered the city hall.

On several occasions Filoteo went to the office of Moreno to plead for the release of his brothers-in-law, and Moreno always answered that he ignored the fate of these people.

One day in May, Moreno came to the house of Filoteo when the latter was not there, and only his niece Romula and his wife were at the house. Upon his arrival, his wife told him that Moreno wanted to see him. On the following morning, Filoteo called on Moreno at his house but he was not there, so he waited for him. When Moreno arrived and after he had taken his lunch, he brought Filoteo to a room and there informed him that Dionisio and Eulogio Biel and Enrique Fargas were killed on the proceding day, May 15, 1944, because the Japanese found out that they were aiding the guerrillas by giving them foodstuffs. In fact, the Biel brothers were helping them with food and medicine. Eulogio Biel even gave medicine and food to the guerrillas in Labuan, to one Lt. Fernandez, Ciriaco Solomon and Loreto Barinquinto, so also did Dionisio Biel, who was a constant aid to the guerrillas. He used to give medicine, food and monetary contribution to the Resistance.

AS TO COUNT 10

The following are facts substantiated by prosecution witnesses Agustin Larracochea, Prudencio Nunal, Venancio Ventura and Victor Garcia:

In the afternoon of February 10, 1944, Agustin Nunal, Raymundo Nunal, Prudencio Nunal, Agustin Larracochea, Agustin Ventura, Claro Nunal and Victor Garcia left Binarangan for barrio Bangus, Lamitan, Province of Zamboanga, for the purpose of locating Ramon and Miguel Nunal, well-known guerrillas in Basilan. For fear they wanted them to surrender to the Japanese forces in Basilan to avoid trouble. They passed the night in the house of Venancio Ventura. On the following day in the morning, a patrol of about 50 uniformed and heavily armed Japanese and *Kaigun Juitai* Filipino soldiers, headed by Moreno and by Eduardo Ventura, the latter as assistant to the defendant, arrived at the house of Venancio Ventura. All the aforesaid persons, including Venancio Ventura were ordered to go down the house. Eduardo Ventura started to investigate them about guerrillas and their activities in the place. Shots were then fired from a nearby hill directed towards the patrol near the house of Venancio Ventura. The Japanese and Filipinos of the *Kaigun Juitai* and those who were investigated, lied flat on the ground. The Japanese and Filipinos composing the patrol returned the shots and the firing lasted for 20 or 30 minutes. While the firing was going on, Prudencio Nunal and Raymundo Nunal ran away to a nearby bush. After the shooting ceased, Moreno and all his armed men approached the house of Venancio Ventura and there continued investigating Agustin and Claro Nunal regarding the whereabouts of Ramon and Miguel Nunal, a lieutenant and sergeant

of the guerrillas at Bangus, Isabela de Basilan, Zamboanga City, the sons of Agustin Nunal and the brothers of Claro Nunal. The two denied knowledge of the whereabouts of Ramon and Miguel and they told Moreno and Eduardo Ventura that they were also looking for the two, but both did not believe what they said. Thereupon, they were slapped and struck with fist blows by Moreno and Eduardo Ventura. The latter was a sergeant under the command of Moreno at the time. After a conference, Moreno told Eduardo Ventura to "finish them up" and then he instructed Eduardo to order Agustin and Claro Nunal, Agustin Ventura, Venancio Ventura, Agustin Larracochea, and Victor Garcia to march forward in single file. After having marched a short distance, Eduardo Ventura ordered them to turn to the left. Then Moreno ordered Eduardo Ventura to fire. Eduardo Ventura aimed his submachine gun at the six unfortunate persons and then fired in rapid succession. Agustin and Claro Nunal died immediately of the shots they received. Agustin Larracochea, a nephew of Agustin Nunal and cousin of Ramon and Miguel Nunal, Agustin Ventura, Venancio Ventura and Victor Garcia were wounded in different parts of their bodies. Agustin Larracochea was seriously hit on the left forearm which resulted in its subsequent amputation. The rest of the victims, excluding Agustin and Claro Nunal, were cured of their wounds after 30 days.

Before Agustin Larracochea lost consciousness, he heard 15 shots in all. When he came to, the Japanese and Filipino patrols were already gone and he then found out that aside from Agustin and Claro Nunal, who were dead, the rest were not there anymore. After the shooting, Prudencio and Raymundo Nunal returned to the bloody scene and found Agustin Larracochea bleeding profusely. Agustin Larracochea later on crawled into the bushes and Prudencio Nunal went to town and reported the incident to the mother of Claro Nunal. On the following day, in the afternoon of February 12, 1944, the bodies of Agustin and Claro Nunal were buried by eight persons from Bangus.

AS REGARDS COUNT 15

Substantiated by the testimony of Ramon A. Camagay and Hermenegildo Santos, we found the following facts:

During the first week of August, 1944, the defendant herein known as Captain Moreno, one morning, caused Candido Cabrera to be brought to his office at Lamitan, City of Zamboanga, where the Headquarters of the *Kaigun Juitai* were. Moreno, wearing beard, was the commander of this military organization composed of Filipinos wearing blue denim uniforms, all arms with rifle furnished by the Japanese. The main work of the *Kaigun Juitai* was

to apprehend guerrillas, guerrilla suspects and sympathizers, and its was attached to the Japanese Navy Police. When Cabrera was brought to defendant's office, his hands were tied behind him, and Moreno questioned him regarding his alleged resistance activities and if he was sent by the guerrillas to spy on the Japanese in Lamitan. Because of the denial made by Cabrera, Moreno gave him fist blows on the face several times, on account of which Cabrera fell down unconscious. Toribio Timonel was the next to be brought upon Moreno's order. He denied, too, having any connection with the Resistance activities in Lamitan, so Moreno also gave him fist blows in different parts of the body. Toribio's hands were tied behind him, and the rope tied to his body and hands was tied to a rafter of his house in such a manner that Toribio was suspended with his feet barely touching the floor. While in that position, two Japanese soldiers, upon orders of Moreno, beat and struck Toribio with a piece of wood, the torture lasting several minutes. Another guerrilla suspect, Daniel Dario was brought in. His head was already covered with blood and his face was swollen and he could hardly move.

After this ordeal and not being able to obtain damaging informations from the three victims, Moreno ordered them brought back to jail in the *Kaigun Juitai* headquarters. That was the last time these three members of the Resistance were seen. Witnesses Camagay and Santos during the latter part of August, 1944, having heard that these three persons were already executed by the Japanese, went to jail where they had been confined, but they did not see them anymore.

THE DEFENCE

The defendant, Miguel Moreno, 43 years old, married, born in Quingoa, Bulacan, from Spanish father and Filipino mother, and a Filipino citizen, declared in substance on the witness stand the following:

While he was serving sentence in the San Ramon Penal Farm, he was assigned as assistant chief of the machinery division. At the outbreak of the war, USAFFE Major Pritchard designated him to take charge of the observation squadron of the Penal Colony, and as such observer, he was ordered, together with the Superintendent of the Penal institution, Severo Yap, to burn the wharf of Recordo, get some machineries and trucks nearby and bring them to San Ramon. At the time there were jail breaks in the colony and he, together with some guards within the penal farm, were ordered to apprehend the escapees. Later, he was pardoned by President Quezon under parole. The written pardon was received by the Superintendent who in turn handed a copy of it to him in the early part of 1942.

The Japanese then landed in Zamboanga. However, sometime before the Japanese arrived in San Ramon Penal Farm, a certain Lt. Fernandez questioned and ordered him and Superintendent Yap to submit a complete inventory of the arms they had in the colony. After a week, at about 10:00 o'clock in the evening, a day before the Japanese proceeded to the Penal Farm, Lt. Fernandez, with a group of armed force came to San Ramon and disarmed him of a Thompson sub-machine gun which was given to him by Yap, and also all the pistols and shotguns in the colony. After they were disarmed, Yap called him and handed him a letter to be delivered to the Japanese liaison officer in Zamboanga. Accompanied by a guard name Amuera, and two trustees, he went to the City by "vinta," a moro sail-boat. Upon arrival, he asked for Yamamura of the Navy Office. After reading the letter, Yamamura said: "that is all right, we will go to San Ramon, you can go with us." When the Japanese arrived at the penal farm, they questioned Superintendent Yap regarding the presence of guerrillas in the colony. Yap told the Japanese that precisely, he sent a letter because the guerrillas have disarmed the colony. He (Moreno) was then investigated regarding the surrender of the Thompson sub-machine gun, and he told the Japanese that he did not surrender it but the guerrillas came to get it, and he handed it to them because the superintendent ordered him to give it.

During all the time that the Japanese were in San Ramon, he was still assigned to the machinery division. On one occasion, the Japanese called him to get an engine in Recodo and to have it repaired. In the afternoon of a day in September, 1943, the Japanese navy commander and his soldiers arrived in San Ramon. Through an interpreter, he was ordered to go with the Japanese to the City. Upon arrival at the City, he was brought before a Japanese called Yamada, who showed him a list of some guerrilla officers and he was asked whether he knew them, but he disclaimed any knowledge. He was asked about a radio at San Ramon but also denied knowledge of it. He was asked about gasoline, and he answered that there was nothing more left because some Japanese had already taken it. An officer of the Kempeitai then asked him whether he knew of the guerrilla headquarters and he answered in the negative. He was accused of being a guerrilla but he also denied this. He was accused of having burned the Recodo wharf. Then he was placed inside a toilet room and thereafter questioned again, but his answer remained the same. He was slapped and his skin was burned with a lighted cigarrette; his hands were tied behinds his back; was thrown in prison and was kept there for 6 days; and during those times he was questioned repeatedly about guerrilla activities, but he

always answered in the negative. Later he was hit on the head by a Japanese, so he lost consciousness. When he recovered, he found out that he was already in a boat with two Americans and some Filipinos. On the third day, they arrived in Davao and were brought to the office of the Kempeitai. He was shown some papers but he disclaimed any knowledge of them; was asked if he wanted to live, and he answered, "yes." Then the Japanese told him that they would spare his life under certain conditions and that he must cooperate with them. Two days later, he was brought back to Zamboanga. On the second or third day in the city, he went to the penal colony in company with some Japanese to get his family and bring them all to the city. Later, he took charge of the Filipinos connected with the Japanese Navy, and the organization was known as "Tai" (police), and not *Kaigun Juitai*. He had no rank of a captain.

With respect to count 2, the defendant made the following story:

On November 16, 1943, a Japanese sergeant named Furuguchi, handed him a letter with instruction to proceed to Patalon in order to get Dr. del Rosario. With some soldiers he went to Patalon coconut plantation where Otto Gale was living without knowing the objective of the Japanese. There was no light in the house when they arrived, so he shouted three times "Good evening." Then a man came out of the window and asked who was there and he replied, "Moreno." He informed him that he wanted to talk with Dr. del Rosario. When they were already in the yard, he lighted a cigarrette and immediately a shot was fired. It came from the copra drier near the Gale home. One of his companions, Juan Macarayan, was mortally wounded. He (Moreno) was hit by a bullet that struck his forehead causing him a wound on the forehead between the two eyebrows and also in the left leg. A bullet was extracted from his forehead. He was then loaded in the truck with Macarayan and brought to the San Ramon hospital.

As to count 3, the defendant set up an *alibi* for, according to his evidence, in the morning of the following day, November 17, the Japanese came and brought him to the Navy hospital in the City of Zamboanga. He stayed in the city for treatment for about a week. He knows Ramon Alvarez and cannot understand why the latter testified against him. But Alvarez, according to the defendant, was an informer of the Navy, he being the one who informed the Navy that Dr. del Rosario was giving support to the guerrillas.

Regarding count 6, the defendant declared that on April 22, 1944, he was in Labuan where the houses of Eulogio and Dionisio Biel were. He stated, however, that he did nothing but follow a patrol composed of Japanese and Filipino armed soldiers, and that when the patrol was in the

grounds near the house of the Biel brothers, Mamerto de Leon informed the Japanese that Eulogio and Dionisio Biel were guerrilla supporters, and upon hearing this information, the Japanese caught the two brothers, tied their hands behind their backs and together with Enrique Fargas, were placed on board a truck and brought to the San Ramon Penal Farm.

As to count 10, the defendant interposed another alibi-defense. He stated that during the month of February, 1944, he found Agustin Larracochea in the Brent hospital in Zamboanga City undergoing treatment of his left arm, and that from January to December, 1944, he was staying in the City of Zamboanga. His witness, Alejandro Gilpayo, a sergeant of the San Ramon guard, testified that during the first week of February, 1944, the defendant went to San Ramon to get a water pump and stayed there for one week. Another witness Daniel Paulino, declared that in the morning the defendant used to accompany him and other Filipino laborers to work in the Calarian landing field, and to escort them in the afternoon, from February to May, 1944, back to San Ramon Penal Farm from the Calarian landing field. On cross-examination, nevertheless, this witness admitted that Moreno absented himself from the San Ramon Penal Farm sometimes and during his stay there in the penal institution, and he was free to go in and out.

Referring to count 15, there is likewise an alibi to the effect that, according to the testimony of the defendant and that of Gregorio Francisco, a prisoner of San Ramon Penal Farm, during the month of August, 1944, the defendant who was in the penal farm, with Japanese soldiers, used to accompany the Filipino laborers to the Calarian landing field where the Japanese were working at that time each morning. In the afternoon, Moreno and the Japanese soldiers also escorted them from the Calarian landing field back to the penal farm.

The Court is fully convinced of the facts testified to by the witnesses for the prosecution constituting the overt acts under counts 1, 2, 3, 6, 10 and 15 of the information.

The different defenses offered by the defendant to those charges are utterly untenable, flimsy.

In the first place, referring to count 1, the defendant would make it appear that he was forced to collaborate with the Japanese in order to save his life and the lives of his family.

To allege duress in a collaboration so plethoric of hideous criminal actions as those perpetrated by the herein defendant according to the evidence on record, is purely nonsensical, a cynicism. The social system would be subverted and there would be no protection for persons or property if the fear of man, needlessly and cravenly entertained, should

be held to justify or excuse breaches of the criminal laws. (See Bain *v.* State, 67 Miss., 557, 560.)

As to count 2, the defendant would assail the facts established by the prosecution of admitting that he was with his men in Patalon on the night of November 16, 1943, but did not do any harm to Otto Gale, nor did he fire a single shot, and that he just accomplished an order from the Japanese to fetch Dr. del Rosario without knowing what they purported to do with the doctor.

The story of the incident of that evening vividly described by prosecution witnesses Ramon Alvarez, Elena Casungcay, and Blas Francisco, is so persuasive that the Court entertains no doubt as to the fact that the defendant in this case caused injuries on Gale's left arm and his abdomen with two revolver shots.

The defendant claims that Juan Macarayan, one of his sons accompanying him to Patalon, was wounded and thereafter died in the Penal Farm's hospital. Although this detail was not brought out by the witnesses for the prosecution for the simple reason that under the circumstances it was beyond their sight, yet it may remain on the record as an established fact, and a fact which strengthens, indeed, the evidence for the prosecution for it is a logical explanation why Moreno and his group retreated from Gale's place and fled back to San Ramon, and why on the following day early in the morning they returned to Patalon patently for a revenge or retaliation. In this connection, it should be recalled the fact disclosed from Ramon Alvarez' testimony that after Gale had fallen to the ground on account of Moreno's revolver shots, he heard many shots, rapid fire, and other shots were fired by Moreno's men directed towards the house after which they left the place boarding a truck.

It is, therefore, clear and positive that the sudden attack by Moreno and his men and the extermination of the Gale family, the looting of their personal properties and the burning of Gale's residence and the surrounding houses in the morning of November 17, was premeditated, a preconceived determination of the defendant, who charged the Gale family of having helped the guerrillas, to seek retaliation, a revenge for the casualty suffered by the assailants on the previous night.

Proceeding to count 3, the defendant, in setting up an alibi-defense, would make it appear that he was also hit by a bullet on the forehead and his leg in that evening of November 16, that he was carried and loaded on the truck, together with Macarayan, and conducted to the penal farm wherein the nurse of the hospital thereof administered first aid and extracted a bullet from his forehead, and that the following day he was taken by the Japanese to the hospital

of Zamboanga where he was confined for one week during which he was not able to go out.

With such a statement, the defendant would like to convey the idea that he was seriously wounded and because of this he was carried and loaded on the truck like Macarayan to the extent that he was unable to go out for a week after that incident. But his own witness, the nurse of the San Ramon Penal Farm hospital who administered the first aid, Timoteo B. Almonte, contradicted him in that, according to this witness, the wound he saw on Moreno's forehead between the eyebrows was very small, punctured, and so slight it was that it did not require any other treatment except a simple application of iodine, and there was no mention at all about any wound on his leg. Furthermore, Almonte declared that Moreno's wound on the forehead might have been caused by a nail or a barbed wire only, as a matter of fact on that particular night Moreno was a little bit drunk or intoxicated. It should be recalled, in this connection, that the premises of Gale's residence, according to evidence, was fenced with barbed wire.

With respect to defendant's unsupported statement that he was unable to go out for a week after the incident of the evening of November 16, it being a gross lie, such an assertion deserves no serious consideration taking into account the unassailable evidence for the prosecution and the testimony of defense witness Almonte itself, which are more than a refutation to this defendant's *alibi*.

The testimony of the witnesses for prosecution leaves no doubt as to the presence and identity of the defendant at the scene pictured out on the record by the above-mentioned three witnesses on the morning of November 17, 1943; and there is no doubt, too, that the defendant herein was the very one who perpetrated the other overt acts to which he offered alibi-defenses. With the exception of the incident of Patalon under count 2 in the evening of November 16, all the overt acts took place in broad daylight, and because the witnesses were involved in those unusual events which were not consummated in a fleeting moment, they could not help but witness the acts committed by the defendant Miguel Moreno, known commonly as Captain Moreno, the Commander of the *Kaigun Jutai*, wearing beard during those times, a maong uniform, a Japanese sword, a .45 caliber revolver, a *caborrata* and other particulars described by the witnesses. They could not be mistaken, therefore, as to his identity. Moreover, he was well known to the public for his open association with the Japanese who made him the instrumentality of their policy of cruelties and atrocities to the extent that the people branded him the title of "The Terror of Zamboanga."

The defendant could not give any explanation on the stand of the witnesses for the prosecution. On the other hand, there is nothing on the record to indicate that these witnesses had any ill motive for testifying in the way they did against the defendant. Moreno himself manifested that he was surprised why Alvarez and the other witnesses whom he knows testified against him, and with respect to the other witnesses unknown to him, he said notthing about their having testified against him. The only witness whom the defendant attempted to discredit was Ramon Alvarez in that, according to the defendant, he was the one who had informed the Japanese Navy that Dr. Del Rosario was helping the guerrillas. This charge, however, finds no support on the record and is manifestly a contempt to the dignity of this distinguished witness, a close friend to Dr. Del Rosario, who pictured the tragic end of the Gale family in a most reliable detailed narration of facts.

There was a slight insinuation from the defendant's testimony to the effect that the prosecution witnesses might have mistaken him for another person who resembled him closely, but a mere insinuation as it is without any support whatsoever on the record, is, so to speak, a stupid and nonsensical defense.

Aside from the inherent incredibleness of the theories of the defense, the same cannot prevail over the avalanche of evidence offered by the prosecution to all the overt acts under counts 1, 2, 3, 6, 10 and 15. After observing their demeanors while testifying at the trial, we find no reason for entertaining any doubt whatsoever as to the veracity of the prosecution witnesses on the salient phases of the unusual events which appear so truely and faithfully produced on the trial.

When the accused is identified by the witnesses for the prosecution by clear, explicit, and positive testimony, the alibi would not be credited, says the Honorable Chief Justice Moran in his book on Evidence. Our highest tribunal held that to establish an alibi, the defendant must not only show that he was present in some other place about the time of the alleged crime, but also that he was at such place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place. The reason why an alibi must be proved by positive, clear and satisfactory evidence, is that oral evidence of alibi is so easily manufactured and usually so unreliable that it can rarely be given credence.

From the facts fully established by the prosecution, it is obvious that defendant Miguel Moreno *alias* Captain Moreno, in committing the overt acts proven on the trial,

violated the allegiance he owed to the Commonwealth of the Philippines and the United States of America during the period therein specified while the war with the common enemy, the Empire of Japan, was in full progress, giving her aid and comfort.

The Japanese invaded our land to subjugate us forever under the disrepute totalitarian policy so-called Greater East Asia Co-Prosperity Sphere. Our soldiers, nevertheless, together with the Americans were eager to do battle for precious liberty and for the cause of democracy, and the heroic defense of Bataan has become a legend in our history. The fall of this last bulwark was a tragic, horrible night but in the midst of unspeakable horror and a democracy of sufferings, the Filipino people, even after the American flag which protected us was lowered in temporary surrender, continued resisting the Japanese through guerrilla warfare and underground movement with the end in view of harassing the enemy occupation and disrupting their program of strengthening their position, conscious that someday we shall enjoy again the blessings of freedom. As our beloved President Roxas said, "there was never a moment in which our hearts or convictions faltered, and the Filipino people discharged their debt of allegiance to the country and to the United States of America with a never surpassed payment of loyalty." We firmly believed in the ultimate victory of the democracies and in General MacArthur's and his forces' return to liberate us from the clutches of the barbarous enemy. Yet, as evidenced by the record, the herein defendant so-called Captain Moreno, commanding the *Kaigun Juitai,* a military Japanese-made organization, believing in the invincibility of the Japanese armed forces, betrayed his country by collaborating with the enemy in the most hideous criminal way, for he allowed himself to be an instrument of the Japanese to carry out their war efforts of crushing the guerrilla organizations and underground resistance by employing cruelest and merciless means, to the extent that he pleased his masters, cool and heartless, with the blood of his brethren whom he submitted to punishment, tortures and horrible deaths. There could not be a more obnoxious citizen turned traitor to his country. His moral aberration is one that cries to heaven for vengeance, and his evilness deserves the imposition of the supreme penalty which is, indeed, a salutary lesson to the present generation and to those yet to come, in that he who betrayed his country by committing high treason, shall be dealt with the whole majesty and severity of our penal law.

For all the foregoing considerations, we hold and so declare that Miguel Moreno, *alias* Captain Moreno, the defendant herein, is guilty and responsible for the crime of high treason complexed with multiple murders on the persons

of (1) Otto Gale, (2) Mrs. Ines Gale, (3) Dr. Eduardo del Rosario, (4) Mrs. Heddy del Rosario, (5) Nene del Rosario, (6) Fred del Rosario, (7) Alejandra, maid of the del Rosario's, (8) Gregoria, another maid, (9) Cristino Geronimo, (10) Andres Fabian, (11) Eulogio Biel, (12) Dionisio Biel, (13) Enrique Fargas, (14) Agustin Nunal and (15) Claro Nunal.

And the Court, therefore, sentences the defendant to suffer death in the manner prescribed by law, and to pay a fine of ₱10,000, and the costs. He shall also pay an indemnity of ₱2,000 to the heirs of each of the above-mentioned persons who had been killed as stated herein.

It is so ordered.

Davao City, 22 March, 1947.

FORTUNATO V. BORROMEO
Associate Judge

I concur:

FLORENTINO SAGUIN
Associate Judge

Associate Judge Vicente Varela took no part.

REPÚBLICA DE FILIPINAS
TRIBUNAL DEL PUEBLO
SALA III

[Causa No. 2040. For Traición]

EL PUEBLO DE FILIPINAS, querellante *contra* ANTONINO PATAPAT, acusado

SENTENCIA

De entre los ocho cargos en que se hace consistir, según la querella, el delito de traición, de que está acusado Antonino Patapat, solo dos trató de probar el fiscal, y son los señalados con los números VI y VII, y se exponen así en la querella:

VI

"That on or about November 15, 1944, in the municipality of Santa Rosa, Province of Laguna, the said accused, acting as informer or agent of the Imperial Japanese Forces in the Philippines, and for the purpose of giving and with intent to give aid and/or comfort to the said enemy, with the aid of a group of armed men who afforded him impunity and taking advantage of the darkness of the night, purposely sought to favor the success of his plans did then and there willfully, unlawfully, feloniously and traitorously lead, accompany and participate in the apprehension and arrest of one Major Leopoldo F. Santos (USAFFE), suspected of being a

guerrilla member, and thereupon, the said accused turned over the said Major Leopoldo F. Santos to the enemy who brutally maltreated, tortured and subsequently executed him."

VII

"That in or about the month of December, 1944, in the municipality of Pililla, Province of Rizal, the herein accused, a Captain of the PAMPAR organization, for the purpose of and with intent to give aid and comfort to the enemy, and taking advantage of the darkness of the night, led and accompanied a party of his PAMPAR men, who afforded him protection and impunity from whatever resistance he might meet, to a raid in the barrio of Calobcob, of the said Municipality of Pililla, and then and there caused and participated in the capture and apprehension of some eleven Filipino members of the guerrilla forces in that place; and thereafter brought their captives to their Pampar garrison, where later, the Japanese came to get nine of the guerrilla captives, as a consequence of which the said nine guerrillas taken by the Japanese were never heard of again."

Para acreditar el cargo VI, declararon Candelaria Moldes, viuda de Santos, y Ángel Moldes, aseverando que en una de las noches del mes de noviembre de 1944, soldados japoneses y makapilis invadieron súbitamente la casa del citado Comandante Leopoldo F. Santos; que éste, pasando por la ventana, se escondió en la copa de un árbol de avocado, pero, en descubiéndole allí, le obligaron a bajar, pinchándole los pies con la bayoneta; le ataron y le llevaron y desde entonces acá no se le ha vuelto a ver; y que, en aquella ocasión, los citados testigos reconocieron, entre los makapilis, al acusado Patapat, que vestía de uniforme militar y portaba un rifle.

Sobre el cargo VII, testificaron Miguel Medina, Ángel Maranan y Laureano Matuling, declarando que, en octubre, noviembre y diciembre de 1944, siendo guerrilleros, fueron detenidos por el enemigo y encarcelados en un edificio escolar del barrio de Bagungbayan, Pililla, convertido entonces en cuartel de tropas japoneses y filipinas; y que, en aquel lugar, conocieron al acusado, que siendo un número de aquella guarnición, unas veces, estaba de centinela, otras veces, traía manjares a los detenidos.

El acusado, por su parte, contiende que nunca formó parte de la fuerza pro-japonesa, llamada "Pampar," ni figuró entre los makapilis que, en noviembre de 1944, secuestraron al Comandante Leopoldo F. Santos; y que, si estuvo en el mencionado cuartel de Pililla, desde el septiembre de 1944 hasta el enero del año siguiente, se debió a que, habiéndose sumado a la Constabularia el 1.o de marzo de 1943, sirvió en Santa Cruz, Laguna, hasta el mes de abril de 1944, en que abandonó el servicio y se refugió en Caloocan, Rizal; pero, capturado por desertor, en esta Ciudad, fué condenado en agosto del mismo año, por un consejo de guerra, a sufrir trabajos forzados en

el aludido cuartel. Allí se topó con los testigos de cargo Medina, Maranan y Matuling.

Como se vé, estos testigos de cargo confirman la presencia del acusado en el cuartel de Pililla, por lo menos, desde el mes de octubre hasta el diciembre de 1944. Aún más: Miguel Medina asegura que, por lo que él había observado, el acusado prestaba entonces a la guarnición servicios de criado, confirmando así el dicho de Patapat de que era un penado, no un miembro de la tropa.

Ángel Maranan, por su parte declaró así:

COURT: Did you not ask him why he was sympathizing with you, why he was a Pampar and yet apparently friendly with the Japanese?

WITNESS: He has been relating us a story one night that he was a guerrilla, and before he was a P. C. He was placed in Fort Santiago and was forced to join the Japanese to save his life. He said "Don't worry, partner. If you will be killed by the Japanese, I myself will fight the Japanese in the garrison until all of you are loose." (T. n. t., sesión de 13 de mayo, 1947.)

Finalmente, Laureano Matuling relata que, algunos soldados japoneses le cogieron y le encerraron en el cuartél del barrio de Bagungbayan, después de amarrarle las manos; pero, luego, llegó el acusado y le desató; y como escareasen los víveres, Patapat solía sustraer las provisiones de boca de la tropa y se las daba a los detenidos, que eran todos guerrilleros. Les reveló además, que el enemigo abrigaba el designio de llevar a Sinilcan a todos los detenidos, al objeto de ejecutarlos allí, y que, de realizarse este plano, el acusado se pondría en contacto con los guerrilleros del monte para intentar un golpe a la guarnición de Pililla.

De estos hechos, traídos por la misma acusación, se desprende claramente que, suponiendo que el acusado hubiera pertenecido a la tropa de los Pampar y que esto sólo constituyese un acto de ejecución (overt act) del delito de traición, con todo no existiría la intención de traicionar, o sea, el ánimo de hacer causa común con el enemigo, habiendo la propia acusación probado de que, sobre ser el Patapat un guerrillero, se había erigido en defensor y protector de la guerrilla. Esto en cuanto al cargo VII.

Referente al cargo VI, se notará que la presencia de Antonino Patapat en Pililla, de octubre a diciembre de 1944, atestiguada por los nombrados testigos de cargo corrobora, de algún modo, a la coartada del acusado de que no podía estar, en noviembre del mismo año, en Santa Rosa y participar en el secustro del Comandante Santos. El fiscal advierte que la coartada se fabrica tan fácilmente que raras veces debe ser creída, a lo que replicamos que, tampoco ofrece dificultad la identificación del acusado hecha por Candelaria Moldes y su sobrino carnal Ángel Moldes,

cuyo testimonio no merecerá confianza, si se han de apreciar y considerar estos detalles:

(*a*) Esta declaración entre tía y sobrino, que identifica o inculpa al acusado, no está, en absoluto, corroborada por ninguna otra prueba, ni siquiera por las tituladas confesiones de Antonino Patapat y su testigo Federico Alba, Exhíbitos A y B;

(*b*) Sobre no estar confirmados dichos testimonios todavía se contradicen, porque, mientras Ángel Moldes asevera que el secuestro del Comandante Santos tuvo lugar las 3 de la madrugada del día 15 de noviembre de 1944, Candelaria Moldes aseguran que tal suceso ocurrió las 3 a. m. del *día 16* del referido noviembre; y

(*c*) Candelaria Moldes fué testigo de cargo en la causa No. 138 de este tribunal, contra Ricardo Beato, y entonces relató el aludido secuestro, nombrando a todos los que tomaron parte en el hecho criminoso, pero sin mencionar a Antonino Patapat, apesar de que fué repetidamente interrogada sobre los nombres de todos los que fueron reconocidos por ella en aquella noche de autos. Aunque por regla general, los tribunales no están autorizados para tomar conocimiento judicial del contenido de los expedientes de otros asuntos (E. U. *vs.* Clavería, 29 Jur. Fil., 556; El Consejo Municipal de San Pedro, Laguna, *vs.* Colegio de San Jose, Gac. Of., Tomo 38, No. 50, pag. 1134, abril 25, 1940); con todo, podrá asumirse tal conocimiento judicial, cuando aquel asunto, como la referida causa No. 138, estuviere estrechamente entrelazado con el presente o el uno dependa mucho del otro (Moran, *Derecho de Pruebas*, pág. 14) y para evitar una injusticia (Story *vs.* Ulman, 88 Md. 244, 41–A–120).

Concluímos, pues, después de apreciar detenidamente las pruebas referentes a los cargos VI y VII, que no es dable a la conciencia judicial descansar tranquila en la certidumbre de la culpabilidad del acusado.

Por lo tanto, el tribunal absuelve de la acusación a Antonino Patapat, con las costas de oficio, y ordena su inmediata libertad.

Así se ordena.

Manila, Filipinas, a 24 de junio de 1947.

JOSÉ S. BAUTISTA
Juez Asociado

Conformes:

ARSENIO P. DIZON
Juez Asociado

TIBURCIO TANCINCO
Juez Asociado

REPUBLIC OF THE PHILIPPINES
PEOPLE'S COURT
FIFTH DIVISION, ZAMBOANGA CITY

[CRIMINAL CASE NO. 51. FOR TREASON]

PEOPLE OF THE PHILIPPINES, plaintiff, *versus*
SILVESTRE ACUÑA, accused

DECISION

BORROMEO, *J.*:

Indicted for treason on three overt acts, Silvestre Acuña, of Zamboanga City, a Filipino citizen by birth, pleaded not guilty to the charges upon his arraignment, and entered into trial, assisted by his counsel, Attorney Rafael Climaco, on the date his case was scheduled in the calendar, February 12, 1947, seven persons having been placed on the witness-stand for the state, namely; Artemio Santiago and Ricardo Fernandez, for Count No. 2; Ignacio Balais and Florencio de los Reyes, for Count No. 3; Carlos Camins, Jr., Celedonio Bucoy and Neri Natividad, for Count No. 1.

After the prosecution had rested its case, the counsel for the defense moved a petition for dismissal because the evidence adduced at the trial does not substantiate the charges.

Upon due deliberation on the merits of the case, we arrive at the conclusion that the petition is well founded. Motion sustained.

Let us analyze the evidence on record.

As to Count No. 1 which alleges "that during the period from November, 1942, to December, 1944, in the City of Zamboanga, the above named accused, for the purpose of giving and with intent to give aid and comfort to the enemy, did then and there wilfully, unlawfully and feloniously act and serve as agent and informer of the Japanese Military Police (Kempei Tai) in said City of Zamboanga, and that among his duties as such were to apprehend guerrillas, report to the Japanese Military Police those persons who spoke against the Japanese, arrest those in possession of firearms, act as guide of the Japanese patrols in search of guerrilla hideouts and participate in raids against guerrilla forces;"

Carlos Camins, Jr., associate editor of the Zamboanga Times, averts that while he was a reception clerk of the Kempei Tai, from August, 1943 to August, 1944, he used to see Silvestre Acuña, the defendant herein, visiting the Kempei Tai headquarters in Zamboanga City at an average of one or two times a month just to see Sergeant Yaniguihara or Corporal Fugihara, non-commissioned officers of

the Kempei Tai. He cannot tell what his purpose was because after he ushered him to Sergeant Yaniguihara or Corporal Fugihara, the door was closed. There were also other Filipinos who came to the office. Neri Natividad also declared that in October, 1943, he was employed as driver and jailer at the Kempei Tai and he came to know the defendant because the latter used to visit the Kempei Tai headquarters once and sometimes twice a month to see Sergeant Yaniguihara although he does not know what his purpose was. Besides the defendant, there were also other civilians visiting the office to confer with Yaniguihara, like Bucoy and Teodoro Teves and others who used to bring food to those confined therein. Neither Camins nor Natividad saw the defendant visiting the Kempei Tai accompanied by Bucoy. Celedonio Bucoy who claims to be a cousin to the defendant testified that he knew the defendant was a spy because of gossips in the town and because he asked him questions about the news in the city just to trap him and besides he frequented the building where the Japanese Navy used as office.

Count No. 2 of the information alleges "that on or about April 18, 1943, the above-named accused, acting as agent and informer of the Japanese Military Police (Kempei Tai) in the City of Zamboanga, for the purpose of giving and with intent to give aid and comfort to the enemy, did then and there wilfully, unlawfully and feloniously accompany and lead Japanese troops in a raid against the guerrillas in Manica-an, Zamboanga, as a result of which the guerrillas were driven out."

The facts brought out by the witnesses for the state are to the effect that on April 18, 1943, Silvestre Acuña was seen in Manica-an, together with Japanese Commander Iwasa, riding on a car followed by four truckloads of Japanese soldiers. On that occasion, one Japanese advised witness Artemio Santiago not to go farther because they were going to fire towards the mountain. At this juncture, Silvestre Acuña, the defendant, was about 50 meters from him. When he was already in his house, he heard mortar fire and machine gun shots directed to Manica-an, the target of the Japanese fire being presumably the headquarters of Lt. Gerardo Campo, a guerrilla leader. After the firing ceased, the Japanese returned to the city, and witness proceeded to Koro-an to report the happening to Lt. Fernandez, especially on the fact that Silvestre Acuña was seen by him together with the Japanese officer riding on a car followed by four truckloads of Japanese soldiers. The witness also saw the defendant three times in the Kempei Tai headquarters in 1944, though he did not do anything but he was only sitting. He believes that Silvestre Acuña was a spy of the Japanese because he was with them.

Ricardo Fernandez is not an eye-witness and merely testified that on April 18, 1943, Artemio Santiago arrived at his post, he being then a Provost Marshal of the guerrillas, and informed him that the Japanese came to Manicaan guided by Silvestre Acuna and fired at the headquarters of the guerrillas in the mountains.

Regarding Count No. 3, it is alleged "that in or about March, 1944, in the City of Zamboanga, the above named accused, acting as such agent and informer of the Japanese Military Police (Kempei Tai), for the purpose of giving and with intent to give aid and comfort to the enemy, did then and there wilfully, unlawfully and feloniously cause the arrest of one Ignacio Balais for alleged possession of firearm, whereupon said Ignacio Balais was maltreated, tortured and detained for one day at the headquarters of the Japanese Military Police in said city."

On one Sunday of March, 1944, according to Ignacio Balais, while he was in the cockpit of the City of Zamboanga, one Andres Bucoy and the defendant told him that Sergeant Maniguihara wanted to talk to him. Then he proceeded to the Japanese sergeant who together with Andres Bucoy and Silvestre Acuña brought him to the house of said Bucoy. There, he was investigated about his firearm by Bucoy and the Japanese sergeant who slapped and clubbed him after he answered that his firearm was lost. But Silvestre Acuña was not in the door where he was investigated and punished. On that very afternoon he was released by the sergeant. This is corroborated by Florencio de los Reyes, save that according to the latter, Ignacio Balais was slapped and clubbed by the Japanese sergeant and Bucoy in the presence of the defendant who was also in the room. Moreover, according to Florencio de los Reyes, Silvestre Acuña was a secret agent of the Japanese because he had heard a lot about him being so.

The young counsel for the defendant, in his oral argument, adduced sound reasonings which, in the opinion of the Court, justify his stand in asking for the dismissal of the case without presenting any evidence for the defense.

The defendant is charged in the first count with having served the enemy as agent and informer of the Kempei Tai. The counsel contends that there is no conclusive evidence to sustain this charge. He is right. The fact that Acuña was seen once or twice a month visiting the Kempei Tai headquarters to see or confer with two Japanese non-commissioned officers for an object which was not disclosed on the record, is no proof for a conclusion that he acted as such an informer or spy of the enemy. Prosecution witness Ignacio Balais made assertion that Acuña was a Japanese spy, but he based himself merely on the gossip in town.

In Count No. 2, the defendant is charged with having led a Japanese patrol to Manica-an against a Resistance outpost. The only proof on the record is that he was seen by Artemio Santiago on April 18, 1943, together with a Japanese commander, Iwasa, without any arm, riding on a car followed by four truckloads of Japanese soldiers. This fact alone, without any other circumstancial evidence, is not enough to conclude that he led the Japanese patrol on that occasion. And even granting that he led the Japanese patrol, this overt act should be established by two competent witnesses for, according to our Penal Code, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The testimony of the other witness, Ricardo Fernandez, is not corroborative on the overt act, for he was not an actual witness to the facts testified to by Artemio Santiago.

Again, coming to the third count, there is no conclusive proof that the defendant caused the apprehension and punishment of Ignacio Balais. This witness simply testified that the defendant and Bucoy told him in the cockpit that Sgt. Naguihara wanted to see him, then he proceeded to the place where the Japanese was, in the cockpit, and thereupon he was taken to the home of Bucoy where he was slapped and clubbed by the Japanese and Bucoy in a room, while the defendant was outside and did not do any harm on him.

The counsel for the defendant, indeed, is justified to say that "inasmuch as our courts of Justice are bound by rules of evidence, it is most difficult to find a defense for the accused because there is nothing to defend." Silvestre Acuña, the herein defendant, was an enemy collaborator, an agent, a spy of the Japanese, and as a traitor to our country, to the cause of democracy, he should be dealt with by a severe punishment. That would be the course of justice had the prosecution established its averments at the trial of this case. And that is the general impression, the judgement, so to speak, of the public of Zamboanga in the expression of witnesses for the state. The accused, according to witness Florencio de los Reyes, was a secret agent of the Japanese "because I heard a lot about his being so." "I came to know—said another witness, Celedonio Bucoy—that Silvestre Acuña was a spy because of gossips in the town."

Hearsay evidence, as a general rule, has no place in our courts of justice. Public opinion on the treasonous character of a person is no evidence to sustain a conviction for treason. A judicial judgment cannot be based but on proven facts of material matter to the overt act charge to

the accused, for our law on evidence rules that throughout all criminal trials, the burden rests upon the prosecution to prove the guilt of the accused, or, in other words, to prove each and every material element of the offense charged, beyond reasonable doubt. The defendant in treason prosecution is not bound to show the object and meaning of the acts done; it is incumbent on the prosecution to make out a case against him.

The burden of proof is a formal rule determining the order in which the proofs are adduced on the trial, which rule ceases to apply to when, in a criminal case, sufficient proof has been adduced to sustain a conviction. The presumption of innocence is a rule of substance, operating during the whole trial, and continuing to operate until overcome by proof of the guilt of the accused beyond a reasonable doubt. It should be clearly borne in mind that the presumption of innocence is a rule of law, and not a weight of evidence. Where the evidence is sufficient to establish the fact in issue beyond a reasonable doubt, then the prosecution has overthrown the presumption of innocence. Where the evidence fails to establish the fact in issue beyond a reasonable doubt, then the presumption prevails. A rule of law never arose out of evidence; such a rule is itself a measure of evidence.

To conclude, the evidence adduced on the trial in the present case being not sufficient to prove the criminal intent of the defendant which is necessary element of the crime of treason, and there being neither conclusive proof that the defendant rendered aid and comfort to the enemy, which is another essential element of this crime, he is entitled to an acquittal, for the case of the prosecution is not made out beyond reasonable doubt.

The defendant, Silvestre Acuña, is hereby absolved from the charges in the information with all the legal pronoucements in his favor.

The records show that this defendant is being detained in jail for more than two years due to his inability to put up a bond for his temporary release. It is, therefore, hereby ordered that he be freed at once.

So ordered.

Zamboanga City, February 14, 1947.

FORTUNATO V. BORROMEO
Associate Judge

I concur:

FLORENTINO SAGUIN
Associate Judge

RÉPUBLICA DE FILIPINAS
TRIBUNAL DEL PUEBLO
FOURTH DIVISION

[Causa Criminal No. 3460. Por Traición]

EL PUEBLO DE FILIPINAS, querellante, *contra* EMILIANO TRIA TIRONA, acusado

ORDEN

El acusado lo está del delito de traición previsto y penado por el artículo 114 del Código Penal Revisado, según querella de 11 de marzo de 1946, archivada en autos por los acusadores especiales señores Jesús Y. Pérez, Macario Peralta, Godofredo Escalona y Benjamín K. Gorospe.

La querella contiene once cargos contra el acusado, quien, después de informado de la misma, se declaró no culpable.

Al comienzo de la vista, la representación del Gobierno hizo constar que con respecto a los cargos 5, 6, 7, 8, 9 y 11 de la querella, dicha representación no podía llenar o satisfacer la regla de dos testigos requeridos por la ley, para justificar condena por el delito de traición, y por tanto, desistía de proseguir y abandonaba dichos cargos, pero que presentaría pruebas en cuanto a los demás cargos, o sea, los números 1, 2, 3, 4 y 10.

La vista del asunto, pues, fué celebrada en cuanto a los cargos, brevemente expuestos, consisten en lo siguiente:

CARGO NO. 1

Que el 30 de junio de 1943, el acusado aceptó el cargo de miembro de la Comisión Preparatoria para la Independencia de Filipinas, y después, con los demás miembros de dicha comisión, concurrió a juntas para deliberar, discutir y redactar, como en efecto, redactaron el documento llamado "Constitución de la República de Filipinas."

CARGO NO. 2

Que el 4 de septiembre de 1943, el acusado votó por la aprobación y adopción del documento llamado "Constitución de la República de Filipinas" y firmó dicho documento por virtud del cual se organizó y estableció el Estado Maniquí (Puppet) de la República de Filipinas."

CARGO NO. 3

Que hacia el 4 de enero de 1944, el acusado aceptó y desempeñó el cargo de Ministro de Sanidad, Trabajo y Bienestar Público, en el gabinete del estado Maniquí (Puppet) el llamado "República de Filipinas," y ejerció las funciones y deberes anejos al mismo hasta la liberación.

CARGO NO. 4

Que hacia el 7 de enero de 1944, el acusado suscribió y prestó juramento del cargo de Ministro de Sanidad, Trabajo y Bienestar Público, en el gabinete del llamado Presidente de la "República de Filipinas."

CARGO NO. 10

Que hacia el 21 y 22 de septiembre de 1944, el acusado, como Ministro de Sanidad, Trabajo y Bienestar Público y Ministro del Consejo de Estado, atendió dos juntas (meetings) que se celebraron para deliberar y discutir la necesidad de declarar la guerra contra los Estados Unidos de América y Gran Bretaña, y después asintió y votó en favor de y aprobó la Proclama No. 30 del Presidente Maniquí, José P. Laurel, declarando el estado de guerra entre la "República de Filipinas" y los Estados Unidos de América y Gran Bretaña.

Después de cerrado el período de pruebas del Gobierno, la defensa del acusado pidió el sobreseimiento del asunto, alegando como fundamento que no se ha probado mediante el testimonio de dos testigos la culpabilidad del acusado, como lo requiere la ley.

Resulta de las pruebas en autos:

Que el acusado es ciudadano filipino, antes, durante la ocupación japonesa y hasta el presente.

Que la Comisión Preparatoria para la Independencia de Filipinas, fué formalmente organizada en una solemne ceremonia que tuvo lugar en la residencia oficial de su Excelencia el Teniente General Sigenori Kuroda, Comandante en Jefe del Ejército Imperial Japonés en Filipinas, en la que dicho Comandante en Jefe leyó una orden titulada: "Formación de la Comisión Preparatoria de la Independencia de Filipinas," por la cual fué aprobada la formación de dicha Comisión con los miembros que la componían, incluyendo al acusado, seleccionados por la Comisión Nacional del Kalibapi, autorizándola a proceder inmediatamente con los trabajos preparatorios para la Independencia (Exhíbit I–1, pág. 547, vol. 2, No. 6, O. G.) ; que la Comisión Preparatoria de Independencia celebró juntas para preparar, discutir y redactar una Constitución, que más tarde fué adoptada y aprobada por dicha Comisión, compuesta de veinte miembros; que no se sabe si el acusado estuvo o no presente en dichas juntas, pues, mientras el testigo Ernesto Cuerva, jefe-taquígrafo de la Comisión, afirma que el acusado asistió a algunas, el testigo Senador Proceso Sebastián, que era Secretario Ejecutivo de la misma declara, "que no puedo afirmar que el acusado concurrió a dichas juntas."

Que ninguno de los testigos (Sebastián, Cuerva y Nakamura) ha visto firmar al acusado el original de la Constitución, que no se ha presentado, ni tampoco su copia impresa *souvenir*, que se ha presentado como prueba, y admitido como parte de la declaración de los testigos Becker, Sebastián y Cuerva que hicieron referencia a la misma (Exhibit G) ; que el acusado estuvo presente en las ceremonias de la firma en el edificio de la "Metropolitan Water District"; que la Constitución fué publicada en la *Gaceta Oficial* el 4 de septiembre de 1943, (Exhibít I) ; que de conformidad con

dicha Constitución se organizó y estableció un Gobierno llamado "República de Filipinas."

También resulta de las pruebas que el 4 de enero de 1944, el acusado aceptó y desempeño el cargo de Ministro de Sanidad, Trabajo y Bienestar Público en el gabinete de la llamada "República de Filipinas" y desempeñó los deberes anejos al mismo, hasta la liberación de Manila por las fuerzas del Ejército de los Estados Unidos.

Asimismo, resulta de las pruebas, que el "Presidente" José P. Laurel, celebró un "Tratado de Alianza" con el Japón el 14 de octubre de 1943, representado por Claro M. Recto, como Ministro de Estado, nombradc y apoderado al efecto como "Plenipotenciario" por dicho "Presidente" de la "República de Filipinas, habiendo sido representado el Emperador del Japón, por Shoto Murata Syusanme, como "Embajador Extraordinario y Plenipotenciario." (Exhibit E.)

Que el 18 de noviembre de 1943, el "Presidente," José P. Laurel expidió la Proclama No. 4, haciendo público el tratado y llamado a todos los ciudadanos para que cumplan con las provisiones del mismo. (Exhíbit E–1.)

El 22 de septiembre de 1944, el mismo "Presidente" José P. Laurel de la llamada "República de Filipinas," expidió la Proclama No. 30, por la que declaraba la existencia de un estado de guerra entre la "República de Filipinas," los Estado Unidos de América y Gran Bretaña. (Exhíbit F.)

No consta por ninguna prueba que el acusado haya tomado parte alguna, tanto en la deliberación, discusión o votación del tratado de alianza, como de la Proclama, declarando un estado de guerra, previa a su expedición. Por el contrario, del contexto de dichos documentos (Exhíbitos E y E–1, Tratado de Alianza) se desprende claramente que las únicas personas que intervinieron en su celebración, son el "Presidente" Laurel, en primer término, su "Ministro de Estado" Claro M. Recto, quien intervino, como "Plenipotenciario" nombrado por dicho "Presidente," en representación de la "República de Filipinas," la "Asamblea Nacional" de dicha "República," quien mediante la resolución No. 4 de 18 de octubre de 1943, concurrió en la conclusión de dicho tratado. En cuanto a la "Declaración del Estado de Guerra," aparece que solamente el "Presidente" José P. Laurel la expidió y proclamó. (Proclama No. 30, Exhibit F.)

Ni siquiera consta del documento mismo, ni por ningún otro documento, que el citado "Presidente" Laurel haya cumplido con el Artículo V, sección 12 de la Constitución, (Exhíbito G) de la llamada "Republica de Filipinas," que dice: "El Presidente, con la concurrencia de dos-tercios de los miembros de la Asamblea Nacional, tendrá el poder de declarar la guerra y hacer la paz * * *."

Del resultado de las pruebas que se han mencionado hemos llegado a la conclusión: (1) Que el acusado fué miembro de la Comisión Preparatoria para la Independencia; (2) que el nombre "Emiliano Tría Tirona" aparece en la página 22 del Exhíbito G–2, o sea, la versión inglesa de la Constitución, y sobre dicho nombre una aparente firma del acusado que no ha sido debidamente autenticada por ningún testigo, pues los testigos Senador Sebastián y Ernesto Cuerva, dijeron no haberlo visto firmar, el primero afirmó, además, que no es un experto en firmas y no conoce la firma del acusado. El testigo Nakamura, todo lo que pudo afirmar es que *cree* que es la firma del acusado; (3) que el acusado aceptó, juró y asumió el cargo de Ministro de Sanidad, Trabajo y Bienestar Público y desempeñó los deberes anexos al mismo.

Resumiendo: de entre los cargos formulados contra el acusado se puede decir que solamente se ha probado que él fué miembro de la "Comisión Preparatoria para la Independencia de Filipinas," y que aceptó y asumió el cargo de "Ministro de Sanidad, Trabajo y Bienestar Público."

La ley de traición en Filipinas se define y penaliza en el artículo 114 del Código Penal Revisado como sigue:

> ART. 114. El que, debiendo fidelidad a los Estados Unidos o al Gobierno de las Islas Filipinas, sin ser de nacionalidad extranjera, les hiciere la guerra o *formare causa común con sus enemigos, ayudándoles o socorriéndoles dentro o fuera de dichas Islas*, será castigado con las penas de reclusión temporal a muerte y multa que no exceda de veinte mil pesos.
>
> Será necesario para condenar a una persona por el delito de traición *el testimonio de dos testigos por lo menos, acerca de un mismo acto de ejecución* o la confesión del culpable en sesión pública del Tribunal. (Las cursivas son nuestra.)

De conformidad con dicho artículo existen dos maneras de cometer traición: 1.ª—hacer la guerra contra los Estados Unidos de América o Filipinas; 2.ª—formar causa común con sus enemigos, ayudándoles o socorriéndoles dentro o fuera de Filipinas. Además, para que proceda condenar por el delito de traición es necesario el testimonio de dos testigos por lo menos acerca de un mismo acto de ejecución o por la confesión del culpable en sesión pública del Tribunal.

En el caso de autos el acusado lo está, según la querella y las pruebas aportadas, de haber cometido el delito de traición proveído en la segunda parte del artículo citado, o sea, de haber formado causa común con el enemigo ayudándole o socorriéndole dentro de Filipinas.

Un examen cuidadoso de las pruebas presentadas por el Gobierno revela la ausencia absoluta de prueba en cuanto a los actos de ejecución (overt acts) y sobre el elemento esencial del delito de traición consistente en haber hecho causa común con el enemigo, traducido comúnmente como

adhesión al enemigo, ayudándole o socorriéndole dentro de Filipinas.

En los delitos de traición no hasta alegar y probar que el acusado ha ejecutado actos que constituyen ayuda y alivio (comfort) al enemigo, sino que es necesario también probar la adhesión de parte del acusado al enemigo.

No se puede negar el hecho de que el acusado ha aceptado, ocupado y ejercido los cargos públicos que se le atribuyen en los cargos 1 y 3, o sea, el de "Miembro de la Comisión Preparatoria de la Independencia" y el de "Ministro de Sanidad, Trabajo y Bienestar Público." Pero, declaramos: que la mera aceptación de dichos cargos durante la ocupación japonesa no constituye traición dentro del significado de la ley de traición, a menos que el acusado haya cometido otros actos, antes, durante o después del desempeño de su cargo, en relación con el mismo que demuestren su intención de traicionar, adhiriéndose, ayudando y socorriendo al enemigo. (Estados Unidos *vs.* De los Reyes, 3 Phil., 349; People *vs.* Garcia, Crim. No. 13; People *vs.* Dayrit, Crim. No. 95; People *vs.* Francisco, Crim. No. 3534; People *vs.* Alunan, Crim. No. 3461; Cramer *vs.* U. S. 65, S. Ct. 918.)

El eminente tratadista Blackstone ha dicho, que: "como la traición es el más alto crimen civil que algún hombre puede posiblemente cometar, debe ser por tanto en grado sumo libremente cerciorado."

A falta de otras pruebas, fuera de la aceptación por el acusado de los cargos de que se ha hecho mención, hemos escrutado los actos ejecutados o que pudiera haber ejecutado en el curso ordinario del ejercicio de las facultades y deberes anejos a su cargo, para deducir o inferir de dichos actos si intentó traicionar a su patria cometiendo los actos. Así, como Miembro de la Comisión Preparatoria de la Independencia, se le atribuye haber firmado la "Constitución de la República de Filipinas." Este hecho no ha sido satisfactoriamente probado por el testimonio de dos testigos que le hayan visto firmar. Pero, suponiendo que lo haya firmado, tal acto no constituye traición, teniendo en cuenta el ambiente, la época y circunstancias de coacción bajo las cuales se organizó o creó la "Comisión Preparatoria de Independencia," y se firmó la Constitución, mediante Orden del Comandante en Jefe del Ejército Imperial Japonés, Teniente General Kuroda.

No nos llamamos a engaño, al interpretar la referida orden (Exhíbit I) titulada: "Orden—Formación de la Comisión de Independencia de Filipinas," típicamente Japonesa, en donde se dice con verdadera solapa:

"Por la presente, se concede *aprobación* (approval) para la formación de la Comisión de Independencia de Filipinas * * *"

que no era tal "aprobación," sino una *Orden* en toda regla, pues, no obstante ser los expertos más grandes que ha producido la humanidad, tanto en trucos como en torturas, en la segunda parte de dicha orden, se descubre el imperio del que manda y ordena, cuando dice:

"La Comisión es autorizada a proceder *inmediatamente* con los trabajos preparatorios por la independencia." El vocable "inmediatamente," no puede significar en este caso más que una orden perentoria que demuestra los apuros en que se encontraba el invasor de urgir la independencia, como parte de su propaganda o cebu para la dominación completa del Asia Oriental, procurando hacer uso de los "leaders" filipinos, que bajo las circunstancias no podían rehusar, so pena de ser aplastados bajo la férrea brutalidad del enemigo. Aunque hay que reconocer y admitir también, que pudo haber algunos de dichos "leaders" y no "leaders" que se prestaron voluntariamente a ser instrumentos del enemigo, o se emborracharon del poder y de la protección de dicho enemigo, y cometieron el delito de traición contra este país que les vió nacer y los amamantó.

Por tanto, la firma de la Constitución, si no ha sido acompañada de otros actos voluntarios, antes, durante o después que puedan constituir tración, no constituye traición.

Como Ministro de Sanidad, Trabajo y Bienestar Público, en los Exhíbitos A y D del gobierno, encontramos las funciones que ejerció o pudo haber ejercido el acusado.

Tales funciones, facultades o deberes, tuvieron su origen de la Comisión Ejecutiva presidida por Jorge B. Vargas, quien expidió la Orden Ejecutiva No. 4 (Exhíbit A) de 5 de febrero de 1942, cuya parte pertinente dispone:

"ARTÍCULO VI

Departamento de Educación, Sanidad y Bienestar Público.—

SEC. 36. El Departamento de Educación, Sanidad, y Bienestar Público desempeñará sus funciones bajo la autoridad ejecutiva del Comisionado de Educación, Sanidad y Bienestar Público, quien tendrá supervisión ejecutiva y control administrativo sobre el Buró de Instrucción Pública, de Educación Privada, de Educación Física, de Sanidad, de Bienestar Público, Universidad de Filipinas, Biblioteca Nacional, Instituto Nacional del Lenguaje y Hospital General Filipino."

Después de proclamada la "República de Filipinas," el llamado "Departamento de Educación, Sanidad y Bienestar Público," fué reorganizado mediante la Orden Ejecutiva No. 24 (Exhíbit D) expedida por el "Presidente" Laurel de dicha República en 31 de diciembre de 1943, que en su sección 14 dice:

"SECCIÓN 14. *Poderes, funciones y deberes del Ministro de Sanidad, Trabajo y Bienestar Público.*—El Ministro de Sanidad, Trabajo, y Bienestar Público tendrá a su cargo la protección de la salud del pueblo, el mantenimiento de las condiciones sanitarias, el debido cumplimiento de las leyes relativas a la salud, sanitación y servicios

sociales sobre todas las materias concernientes al trabajo o del trabajo en sus relaciones con el capital y aquellos relacionados con el bienestar del obrero en este país y en el extranjero, así como el cumplimiento de las leyes relativas al capital y al trabajo en Filipinas."

Un examen minucioso de las facultades, funciones y deberes del Ministro de Sanidad, Trabajo y Bienestar Público, revela sin ningún esfuerzo mental que tales funciones eran exclusivamente de carácter social y gubernamental, consistentes: en la protección de la salud del pueblo, el mantenimiento de las condiciones sanitarias, aplicación o ejecución de las leyes relativas a sanitación y servicios sociales especialmente lo concerniente al trabajo y las relaciones entre el capital y el trabajo en este país durante la ocupación japonesa.

Tales facultades, funciones y deberes que se han enumerado, como desempeñados por el acusado, por razón de su cargo como "Ministro de Sanidad, Trabajo y Bienestar Público," no son constitutivos de traición ni adhesión al enemigo, ni presentación de ayuda y *comfort* al mismo, tal como se define en el artículo 114 del Código Penal Revisado.

Nos inclinamos más a creer y así lo declaramos, que el acusado, al ejercer esas funciones, no ha hecho más que obedecer las órdenes del ocupante, de conformidad con la ley internacional, cuyos preceptos constituyen parte de la ley de la nación. (Constitución de Filipinas, Título II, artículo 3; Hague Regulations, articles 43, 52; U. S. Rules of Land Warfare; McNair, Legal Effects of War, p. 322; II Halleck, 444, citado con aprobación por nuestra Corte Suprema en Co Kim Cham *vs.* Valdez, Tan Keh, 41 G. O., 787; International Law, Chiefly as Interpreted and Applied by the United States, 1939; Oppenheim, The Legal Relations between the Occupying Power and the Inhabitants, The Law Quarterly Review, Vol. CXXXII.)

Pero se contiende por la ilustrada representación del Gobierno, en su brillante informe: que después de la firma del llamado "Pacto de Alianza" entre la "República" y el Gobierno japonés, y de hecho la llamada "Declaración de Guerra" por dicha República "puppet" contra los Estados Unidos de América y sus aliados, el haber ocupado o continuado ocupando cargos en la referida República, fué traición.

Por otro lado, la defensa del acusado replicando a dicho informe sostiene: que tal teoría es falsa puesto que bajo la misma, hasta el último barrendero de la calle que trabajaba en dicha época durante la ocupación japonesa sería reo de traición.

La interesante cuestión planteada queda resuelta sin embargo, por los mismos hechos procesales que constan en autos, y, por las decisiones de la Corte Suprema de Filipinas, en los asuntos de Co Kim Cham *contra* Valdez Tan

Keh, 41 G.O. 789; y Peralta *contra* Director de Prisiones, 42, G. O. 204, que dicen:

In view of the foregoing, it is evident that the Philippine Executive Commission, which was organized by Order No. 1, issued on January 23, 1942, by the Commander of the Japanese forces, was a civil government established by the military forces of occupation and therefore a *de facto* government of the second kind. It was not different from the government established by the British in Castine, Maine, or by the United States in Tampico, Mexico.* * *

The so-called Republic of the Philippines, apparently established and organized as a sovereign state independent from any other government of the Filipino people, was in truth and reality, a government established by the belligerent occupant or the Japanese forces of occupation. It was of the same character as the Philippine Executive Commission and the ultimate source of the authority was the same—the Japanese military authority and government. As General MacArthur stated in his proclamation of October 14, 1944, a portion of which has been already quoted, "under enemy duress, a so-called government styled as the 'Republic of the Philippines' was established on October 14, 1943, based upon neither the free expression of the peoples' will nor the sanction of the Government of the United States." Japan had no legal power to grant independence to the Philippines or transfer the sovereignty of the United States to, or recognize the latent sovereignty of, the Filipino people, before its military occupation and possession of the Islands had matured into an absolute and permanent dominion or sovereignty by a treaty of peace or other means recognized in the law of nations. * * * (Co Kim Chan *vs.* Valdez Tan Keh, 41 Off. Gaz., 789–791; Peralta *vs.* Director of Prisons, 42 Off. Gaz., 204–205.)

El Magistrado Ozaeta, al concurrir con la opinión del Tribunal en el citado asunto de Peralta, dijo:

The said government being a mere instrumentality of the Commander-in-Chief of the Japanese Army as military occupant, the ordinance in question promulgated by the President of the "Republic" must be deemed as an act emanating from the power or authority of said occupant. * * * (42 Off. Gaz., 221.)

El Magistrado De Joya, en opinión separada, en el mismo asunto de Peralta, dijo:

The government subsequently established under the so-called Philippine Republic, with a new constitution, was also of the nature of a *de facto* government, in accordance with International Law, as it was established under the authority of the military occupant and supported by the armed forces of the latter. (42 Off. Gaz., 231.)

El Magistrado Briones, también en opinión separada, sostuvo el mismo principio:

* * * la llamada República de Filipinas instaurada durante la ocupación militar japonesa no tenía este carácter, sino que era más bien un gobierno establecido mediante fuerza y coacción por los mismos invasores para promover ciertos designios políticos relacionados con sus fines de guerra. En otras palabras, era el mismo gobierno militar de ocupación con fachada filipina arreglada y arbitrada coercitivamente. (42 Off. Gaz., 260–261.)

Y el Magistrado Hilado, en el mismo asunto, también en opinión separada:

* * * When the "Republic of the Philippines" was established on October 14, 1943, under duress exerted by the Japanese Army, did the Japanese openly, frankly, and sincerely say that that government was being established under their orders and was to be run subject to their direction and control? Far from it! They employed all the means they could conceive to deceive the Filipino people and the outside world that they had given the Filipinos their independence, and that the Filipino people had drafted their own Constitution and established that "Republic" thereunder. But behind the curtain, from beginning to end, there was the Imperial Japanese Army giving orders and instructions and otherwise directing and controlling the activities of what really was their creature for the furtherance of their war aims. * * * (42 Off. Gaz., 257.)

De conformidad pues con las citadas decisiones, la llamada "República de Filipinas" no era diferente de la "Comisión Ejecutiva de Filipinas" presidida por Jorge B. Vargas, siendo una y otra entidad agencia o instrumentalidad del ejército de ocupación, y que los actos de cualquiera de ellas eran actos del ocupante. En tal caso, la llamada "República de Filipinas" no era un estado soberano e independiente con capacidad legal internacional para celebrar tratados o declarar la guerra. Ese "pacto de alianza" y esa "declaración de guerra eran actos del ocupante, al igual que la formación de la "Comisión Preparatoria de Independencia" y al igual que la "Constitución," para sus fines de propaganda. Opinamos que los actos del ocupante ejecutados por medio de las funcionarios del gobierno de ocupación deben considerarse como actos oficiales de éstos y en sí no constituyen *actos de ejecución* (overt acts) de traición. No tiene, pues, importancia el hecho de que el acusado aceptó y desempeñó el cargo de "Ministro de Sanidad, Trabajo y Bienestar Público," después de firmado el llamado 'Pacto de Alianza" y proclamada la llamada "Declaración de Estado de Guerra."

Cada caso particular debe ser examinado imparcialmente y decidido, según sus propios méritos y la ley aplicable.

En el asunto de Cramer *v.* U. S. (65 S. Ct. 918), la Corte Suprema de América dijo lo siguiente:

"The crime of treason consists of two elements: *adherence to the enemy and rendering him aid and comfort.* A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits *no act of aid and comfort to the enemy*—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair cohesion and diminish our strength—*but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.*"

El delito pues de traición se compone según la ley y la jurisprudencia de dos elementos esenciales; adhesión al

enemigo y la prestación al mismo de ayuda y alivio (aid and comfort). Faltando uno de estos elementos, no existe el delito. La adhesión al enemigo implica "intención específica" (specific intention) de traicionar la patria; la prestación de ayuda y alivio no es más que la realización de esa intención específica y requiere la comisión de un acto externo (overt act) por lo menos, que debe probarse mediante el testimonio directo de dos testigos, y no de otro modo. La intención específica de traicionar, o sea la adhesión al enemigo, puede establecerse por medio de cualesquiera pruebas admisibles en derecho.

Fuera de los cargos ocupados por el acusado en el gobierno de ocupación que ya hemos mencionado, las mismas pruebas del gobierno han demostrado, que las funciones y deberes de dicho acusado como tal "Ministro de Sanidad, Trabajo y Bienestar Público" eran, puramente sociales y gubernamentales, o sea, la protección de la salud del pueblo y el cumplimiento de las leyes relativas al bienestar y salud del obrero así como las relaciones entre éste y el capital. Por tales funciones no constituyen ayuda ni *comfort al* enemigo y caen dentro de lo que ya hemos declarado: que el delito de traición no se determina por la mera ocupación y desempeño de un cargo en el gobierno durante la ocupación japonesa, sino, por los *actos* ejecutados por el agente que ocupó o desempeñó dicho cargo, antes, durante o posteriores a dicha ocupación, exceptuándose de esta regla, la ocupación de ciertos cargos que por su carácter y naturaleza constituyen *per se* traición, como el ser espía del enemigo y otros.

El Gobierno no ha probado que el acusado se adhirió al enemigo. Todo lo que ha probado es que ocupó puestos. ¿Qué actos de ejecución (overt acts) delictivos ejecutó antes, durante y posteriores a dicha ocupación? No existe pruebas de ninguna especie en autos sobre el particular.

Por todo lo que antecede, resolvemos que debe estimarse, como se estima, la moción de la defensa. Se sobresee la querella y se cancela la fianza prestada por el acusado para su libertad provisional.

Así se ordena.

Manila, Filipinas, 12 de junio de 1947.

MANUEL ESCUDERO
Juez Asociado

CONCURRING OPINION

RILLORAZA and BERNABE, *Associate Judges:*

We concur in the result.

While there can be no doubt whatsoever that during the most cruel and ruthless Japanese military occupation of the Philippines the accused herein was one of a group of Filipinos that collaborated with the enemy, it is obvious that

in the eye of the law not every enemy collaborator is a traitor. In cases for treason the rule is that the guilt of the defendant must be proved beyond a reasonable doubt on the testimony of two witnesses at least to the same overt act. Upon due consideration of the evidence on record and the facts and circumstances of the instant case we find that the legal presumption of innocence in favor of the accused is undestroyed. In other words, in the present case for high treason the presumption that the accused is loyal to his country and government remains unshaken.

Manila, Philippines, June 12, 1947.

EMILIO RILLORAZA
Associate Judge

JOSE BERNABE
Associate Judge

REPÚBLICA DE FILIPINAS
TRIBUNAL DEL PUEBLO
MANILA
SEGUNDA DIVISIÓN

[CAUSA CRIMINAL No. 3521, POR TRAICIÓN]

EL PUEBLO DE FILIPINAS, querellante, *contra* VICENTE MADRIGAL, Acusado

ORDEN

El acusado lo está del delito de traición bajo el artículo 114 del Código Penal Revisado cometido, según querella fiscal, entre enero de 1942 y febrero de 1945, en la ciudad de Manila y otros lugares de Filipinas, dentro de la jurisdicción de este Juzgado, siendo dicho acusado ciudadano de Filipinas al tiempo en que se cometieron los actos a él imputados, los cuales están especificados en los cargos Nos. 1 al 18, inclusive, de dicha querella tal como ha sido enmendada.

Informado de dicha querella enmendada, el acusado se declaró no culpable.

En el curso de la vista de la causa, el Ministerio Fiscal dió por retirados los cargos alegados en la querella con excepción de los especificados en los Nos. 1, 2, 3 y 5 que se copian a saber:

"1. That during the period from January 8 to January 23, 1942, in the City of Manila, Philippines, and within the jurisdiction of this Court, Vicente Madrigal, the accused herein, with intention of cooperating with the Japanese Military Administration and giving

aid and comfort to the enemy and in response to and complying with a message of the Commander-in-chief of the Imperial Japanese Forces in the Philippines dated January 8, 1942, urging the 'men of importance in the Philippines' to 'cut off your links with the United States of America' and advising them to 'organize the administrative constitution as soon as possible . . . . so as to to be able to carry out our administration harmonizing in one cord with our principle and policy,' did then and there wilfully, feloniously, maliciously and traitorously consider said message and deliberate upon and sign with other 'men of importance in the Philippines,' as member of a 'Provisional Philippine Council of State,' a letter of response addressed to 'His Excellency, the Commander in Chief of the Imperial Japanese Forces,' wherein, among other things, the members of said 'Council of State' acknowledged having taken note of the contents of said message, expressed their willingness 'to obey to the best of our ability and within the means at our disposal the orders issued by the Imperial Japanese Forces for the maintenance of peace and order and the promotion of the well-being of our people, under the Japanese Military Administration,' and advised the Commander-in-Chief that 'we have constituted ourselves into a provisional Philippine Council of State and we are immediately proceeding to draft our Articles of Organization in line with Your Excellency's advice'; and together with other members of the said 'Council of State,' did then and there deliver the said letter in person to the representative of the said Japanese Commander-in-Chief, later causing the the text thereof to be widely publicized in order to inform the people of the Philippines of the offer of cooperation made therein;

"2. That during the period of Japanese occupation of the Philippines, in the City of Manila, Philippines, Vicente Madrigal, the accused herein, with intent to give aid and comfort to the enemy, did then and there wilfully and traitorously accept, hold and occupy the policy-determining and key positions enumerated below in the 'Philippine Executive Commission' and the 'Republic of the Philippines, both governmental instrumentalities of the enemy created for the purpose of furthering her war efforts:

"(*a*) Member, 'Philippine Council of State' from January 23, 1942 until the liberation of the Philippines by the American Forces;

"(*b*) Member, 'Preparatory Commission for Philippine Independence' organized on June 20, 1943, and as such member of the 'Preparatory Commission for Philippine Independence,' together with other members thereof, for the purpose of giving aid and comfort to the above enemy, the Empire of Japan, by aligning the Filipinos with the Japanese-sponsored Greater East Asia Co-Prosperity Sphere, did then and there wilfully, feloniously and treasonably approve and sign the 'Constitution of the Republic of the Philippines,' thereby establishing the so-called Republic of the Philippines,' which purported to be a state entirely independent from the United States and the Commonwealth of the Philippines.'

"3. That on or about the 26th day of February, 1943, in the City of Manila, Philippines, and within the jurisdiction of this Court, Vicente Madrigal, the accused herein, with manifest intent to give aid and comfort to the enemy above mentioned, by strengthening Japan's cause in the Philippines, undermining the faith and confidence of the Filipinos in the eventual victory of the United States of America and the Commonwealth of the Philippines, and condemning the resistance movement against the enemy, did then and there wilfully, unlawfully, feloniously, openly and publicly join,

adhere to and make common cause with the enemy by signing and publishing, together with other members of the 'Council of State' under the 'Philippine Executive Commission', a 'manifesto' addressed to the entire Filipino people, containing, among other statements, the following:

"'Independence is finally within our reach.' *Japan is waging a sacred war for the purpose of liberating the Orient from Occidental domination.* In pursuance of that noble cause, now happily on the point of attainment as a result of her brilliant successes on air, land and sea, she offers us the honor of independence and the blessings that it implies.

"'This *generous and unparalleled* offer, Japan has solemnly made to the Philippines *with the sincerity of a friend and protector* * * * . They had come here, they announced, merely to fulfill Japan's sacred mission, the establishment of Asia for the Asians, the Philippines for the Filipinos.'

* * * * * * *

"'But first of all let us be united. We have a common cause, a common destiny. *Let us all cooperate with our true liberators to the limit of our capacity and ability. Let the misguided remnants of the USAFFE who are still hiding in the mountains abandon any futile resistance* which at best can only mean unnecessary sufferings and sacrifices of our people. * * *.

"'*Why continue resisting those who have honestly, sincerely, and bravely shown by deed that they are really doing their best to make us free?* Japan could have treated us as a conquered enemy, imprisoned our soldiers for the duration of the war, and devastated our country. But these she did not choose to do * * * By *cooperating with Japan actively and in full measure, we emancipate ourselves from political domination and economic exploitation and win for ourselves the honor and glory of independence.*'

* * * * * * *

"5. That during the month of January, 1942 and thereafter, the above-named accused, Vicente Madrigal, having acquired before the war the control and management of the Canlubang Sugar Estate, Inc., one of the subsidiaries of Madrigal and Company, Inc., with its factory and assets located in Calamba, Laguna, and dedicated particularly to the manufacture and production of sugar, alcohol, desiccated coconut and coconut oil, did continue and resume the operation thereof for the purpose of producing such materials as sugar and alcohol needed by the enemy, which the accused herein, Vicente Madrigal, with the intent to give aid and comfort to the enemy aforesaid, wilfully, illegally and feloniously did deliver, sell and convey to the Japanese Imperial Forces; that in furtherance of his desire and intent to give aid and comfort to the enemy the accused, Vicente Madrigal, did later operate and manage the said Canlubang Sugar State, Inc. jointly with the Mitsui Bussan Kaisha, Ltd. and its subsidiary, the Ona Cement Company, Ltd., as trustees thereof and on behalf of the Imperial Japanese Army until the middle of 1943, during which period the said Canlubang Sugar Estate, Inc. produced for the use and consumption of the Japanese Imperial Forces sugar and alcohol; and that about the middle of 1943, the above-named accused, with intent to give aid and comfort to the enemy aforementioned, did then and there wilfully, illegally and feloniously convey, sell and transfer for valuable consideration his interests and shares in the stock and assets of the said Canlubang Sugar Estate, Inc. to Nanyo Kohatzu (South Sea De-

velopment Company), a company organized by the enemy, which thereafter operated the Canlubang Sugar Estate, Inc. for and under the control of the Japanese Army."

Después de que el Ministerio Fiscal hubo cerrado sus pruebas, la defensa pidió el sobreseimiento de la causa fundándose en que las pruebas aducidas por la acusación no son suficientes para sostener los cargos Nos. 1, 2, 3 y 5.

Con respecto al cargo No. 1 en el cual se le imputa al acusado haber tomado parte en su capacidad de miembro del "Provisional Philippine Council of State" en la deliberación, firma y entrega del llamado "Letter of Response" a una carta del Comandante en Jefe de las Fuerzas Imperiales Japonesas dirigida a dicho cuerpo el 8 de enero de 1942, las pruebas aducidas por el Ministerio Fiscal consisten en las declaraciones de Faustino Sychangco y Vicente Formoso y los documentos marcados como Exhíbits K, P–2, P–3, U–1 y U–2. El testigo Faustino Sychangco, declarando sobre las reuniones celebradas en la casa del Sr. José Yulo en las que se trató sobre la preparación y redacción del "Letter of Response," dijo, entre otras cosas, lo siguiente:

"Q. In those occasions that you were present in the deliberations held in the house of Mr. Yulo in connection with the so-called letter of response, did you see Mr. Madrigal?

"A. I do not remember having seen him." (Pp. 358–359, n. t.)

Este testigo no declaró que vió al acusado firmar el "Letter of Response." Asimismo, este testigo dijo que no recuerda haber visto al acusado en la ocasión en que se hizo la entrega del "Letter of Response" al General Maeda (p. 355, n. t.). Por otro lado, el testigo Vicente Formoso declaró lo siguiente:

"Q. Do you know where this letter of response was signed?

"A. I do not know. I have not been present in the signing of that letter of response. When that letter of response was signed, I delivered it to the house of Chief Justice Jose Yulo. I arrived late that was why I did not see anybody signed." (Págs. 405–406, n. t.)

Y este testigo dijo al principio que no recuerda haber visto al acusado en la ocasión en que se entregó el "Letter of Response" al General Maeda (pág. 412, n. t.) pero después de hojear los Exhíbits U–1 y U–2 a instancia del fiscal, manifestó que según el acta Exhíbit U–2 el acusado estuvo presente en el acto de la entrega de dicho "Letter of Response."

El Juzgado ha rechazado el Exhíbit K que es una supuesta fotografía del "Letter of Response," aunque admitió como un acto oficial el Exhíbit P–3 que es el mismo "Letter

of Response" publicado en la *Gaceta Oficial* correspondiente al mes de enero de 1942, Tomo I, No. 1, página 20. El Exhíbit P–2 es la carta del Comandante en Jefe de las Fuerzas Imperiales Japonesas fechada en 8 de enero de 1942, publicada en la *Gaceta Oficial* correspondiente al mes de enero de 1942, Tomo I, No. 1, página 19. El Exhíbit U–1 es la minuta correspondiente a la reunión celebrada en la casa del Sr. José Yulo el día 23 de enero de 1942, mientras que el Exhíbit U–2 es el acta de la lectura y entrega por Jorge Vargas de dicho "Letter of Response" al Comandante en Jefe de las Fuerzas Imperiales Japonesas, habiendo sido admitidos estos exhíbits como parte del testimonio del testigo Formoso.

Después de analizar estas pruebas tanto testificales como documentales presentadas por el Ministerio Fiscal en apoyo de lo que se alega en el cargo No. 1, el Juzgado ha llegado a la conclusión de que no existe ninguna prueba directa referente a la participación del acusado en la deliberación, firma y entrega del tantas veces mencionado "Letter of Response"; los dos testigos, Sychangco y Formoso, no declararon de una manera categórica sobre el particular, y el hecho de que el acusado aparece como uno de los firmantes en el "Letter of Response" publicado en la *Gaceta Oficial* (Exhíbit P–3), no constituye en sí prueba suficiente para hacer a dicho acusado responsable del acto a el imputado. Tampoco son pruebas suficientes los Exhíbits U–1 y U–2 por cuanto que el hecho de que en estos documentos aparecen de que el acusado estuvo presente en los actos en ellos mencionados no puede suplir lo que la ley exige de que tal acto sea probado mediante el testimonio de dos testigos.

En cuanto a la primera parte del cargo No. 2, o sea de que el acusado, con el fin de ayudar al enemigo, acepto, ocupo y desempeño el cargo de miembro del "Philippine Council of State" desde el 23 de enero de 1942 hasta cuando el país fué liberado por las fuerzas americanas, el Ministerio Fiscal presentó en apoyo de su pretensión a los testigos Manuel Zamora, Vicente Formoso y Faustino Sychangco, así como también los Exhíbits E, F, G, H, I y U–3. Todo lo que Manuel Zamora dijo sobre el hecho de que el acusado fué miembro del Consejo de Estado es lo siguiente:

> "A. To tell you the truth I did not know that Mr. Madrigal was a member of the Council of State until I was called by Prosecutor Nolasco and he reminded me and recalled to me that Mr. Madrigal was a member of the Council of State." (Pp. 348–349, n. t.)

Mientras que Vicente Formoso declaró que el acusado fué miembro no sólo del Consejo de Estado Provisional sino también del Consejo de Estado que fué reorganizado por

virtud de la Orden Ejecutiva No. 46 (Exhíbit H; p. 422, n. t.). Este testigo dijo, sin embargo, que el acusado en varias ocasiones estuvo rehacio en asistir a las sessiones del Consejo de Estado llegando al extremo de rogarle que le pusiera presente cuando en realidad de verdad estaba ausente. Esta declaración del testigo Formoso es del modo siguiente:

"A. I remember that in several occasions when I called Mr. Vicente Madrigal to attend the meetings of the Council of State, he made objections to appear in the meeting. He was reluctant to attend the meetings, and he asked me several times if I could make him appear present without attending." (Pp. 446–447, n. t.)

Por otro lado, el testigo Sychangco sólo se limitó al hecho de que los miembros del Consejo de Estado son los mencionados en la Orden Ejecutiva No. 2 (Exhíbit G), siendo su declaración lo que a continuación se transcribe, a saber:

"A. The executive order says that the members are those who affixed their written signatures to the letter of response." (P. 360, n. t.)

En cuanto a los documentos, el Exhíbit E es una copia de la carta dirigida al acusado por el Presidente de la Comisión Ejecutiva informándole de su inclusión en la lista de los que habían de ser renombrados para el Consejo de Estado, lista que dicho presidente recibió de la administración militar japonesa; el Exhíbit F es copia del nombramiento de dicho acusado como miembro del Consejo de Estado expedido por el Presidente de la Comisión Ejecutiva el día 30 de mayo de 1942; el Exhíbit G es la Orden Ejecutiva No. 2 en la cual, en su Artículo II, se provee que entre los que habían de ser miembros del Consejo de Estado eran los firmantes del "Letter of Response"; el Exhíbit H es la Orden Ejecutiva No. 46, enmendando el Artículo II de la Orden Ejecutiva No. 2; el Exhíbit I es la Orden Ejecutiva No. 2 en la que se definen los deberes, funciones y actividades de los órganos centrales de administración y de los juzgados; y el Exhíbit U–3 es la misma Orden Ejecutiva No. 2 ya marcada como Exhíbit G.

A juicio del Tribunal, lo declarado por los testigos Zamora y Sychangco no tiene ningún valor probatorio mientras que el testimonio de Vicente Formoso no está corroborado por ningún otro testigo. El hecho de que del contexto de los Exhíbits E, F, G, H y U–3 se deduce de que el acusado fué miembro del Consejo de Estado no es suficiente para suplir la falta de un testigo que corrobore lo declarado por Vicente Formoso. Además, de la declaración de esta se colige que no fué de la voluntad del acusado el haber sido miembro del Consejo de Estado.

Referente a la segunda parte del cargo No. 2 en la cual se alega que el acusado fué miembro de la "Preparatory Commission for Philippine Independence," y como tal aprobó y firmó la Constitución de la República maniquí, las pruebas aducidas por el Ministerio Fiscal consisten en las declaraciones de Proceso Sebastián, Koji Nakamura y Anastacio Yabut y los Exhíbitos L. M y N. El primero, o sea Proceso Sebastián, dijo, entre otras cosas, que no podía declarar si el acusado estuvo presente en todas las sesiones celebradas por la Comisión, pues sólo recuerda haber visto al acusado en una o dos ocasiones (pág. 123, n. t.), pero el segundo testigo, o sea Nakamura, declaró que él vió al acusado asistir en las sesiones plenarias (pág. 188, n. t.), mientras que el testigo Yabut no declaró categóricamente que el acusado fuese miembro de dicha Comisión. Por otro lado, el primer testigo, a sea Sebastián también declaró que no vió al acusado en el acto en que estampó su firma en la Constitución que la Comisión había redactado (pág. 124, n. t.), mientras que el japonés Nakamura declaró que había visto al acusado firmar la Constitución (págs. 189–190, n. t.). En cambio, el testigo Yabut declaró en contestación a una pregunta del entonces Juez Abad Santos que él había visto al acusado firmar la Constitución (pág. 51, examen condicional del testigo) aunque en repreguntas subsiguientes del abogado del acusado, dicho testigo dijo que él sólo asumía que el acusado había firmado la Constitución (pág. 51, exámen condicional del testigo). Por otro lado, el Exhíbit L es la supuesta fotografía de la Constitución en la cual aparece, entre otras, una firma que dice ser de acusado. Este exhíbit fué admitido como parte del testimonio del testigo Proceso Sebastián. El Exhíbit N es la misma Constitución publicada en inglés y tagalog en el número especial de la *Gaceta Oficial* de fecha 4 de septiembre de 1942. El Exhíbit M es la orden proveyendo a la formación de la Comisión publicada en la *Gaceta Oficial* correspondiente al junio de 1943 (Tomo 2, No. 6, pág. 547), en la cual aparece el acusado como uno de sus miembros.

Estas son las pruebas aportadas por la acusación en apoyo del hecho de que el acusado fué miembro de la Comisión que redactó la Constitución y que firmó la misma. Como se ve hay una discrepancia entre lo declarado por Sebastián y lo manifestado por el japonés Nakamura. Por otro lado, en vista de la manera cómo declaró el testigo Yabut, el Juzgado no cree que él realmente vió al acusado estampar su firma en la Constitución. Además, el Juzgado tampoco da crédito a lo declarado por el japonés Nakamura, pues ha observado que éste, en el curso de su declaración, ha estado vacilante y sonriéndose de una ma-

nera sarcástica, creándose así la impresión de que no era veraz y sincero. Por otro lado, el Exhíbit L no es suficiente para probar el acto delictivo imputado al acusado, en defecto del testimonio de dos testigos presenciales de que el acusado estampó su firma en el original de la Constitución, ni tampoco se ha probado que es genuina la supuesta firma del acusado en el Exhíbit L, y el Exhíbit N no puede considerarse como prueba suficiente para demostrar lo que se le imputa al acusado en este cargo. Tampoco es suficiente el Exhíbit M puesto que el mismo es una mera copia publicada en la *Gaceta Oficial* de la supuesta orden formando la Comisión Preparatoria para la Independencia Filipina en la cual aparece el aquí acusado como uno de sus miembros.

Sobre el cargo No. 3 de la querella en el cual se alega que el acusado firmó y publicó juntamente con los otros miembros del Consejo de Estado un documento llamado "Manifesto" que estaba dirigido al pueblo filipino, el Ministerio Fiscal presentó en apoyo del mismo el testimonio de los testigos De Jesús, Zamora, Sychangco y Formoso, y los Exhíbits O, O–2, U–4, U–5, U–6 y U–7. De Jesús declaró que soló vió a dos o tres miembros del Consejo de Estado estampar sus firmas en el "Manifesto" y no recuerda haber visto al acusado en aquella ocasión, siendo su testimonio del modo siguiente:

"Q. Did you see the accused on that occasion?
"A. I do not remember now. He could have been there, because all members of the Council of State and high officials of the Philippine Executive Commission were there". (P. 339, n. t.)

Mientras que el testigo Zamora declaró en la forma siguiente:

"Q. Do you know if Mr. Madrigal was in Malacañan on the occasion of the signing of the original of the Manifesto, Exhibit O?
"A. I do not know. I do not remember." (P. 349, n. t.)

Por su parte, Sychangco dijo que no recuerda si el acusado estaba presente durante las deliberaciones concernientes al "Manifesto" ni tampoco recuerda si el acusado estaba presente en el acto de la firma de dicho "Manifesto" y su declaración es del modo siguiente:

"Q. Do you know if Mr. Madrigal was present during that deliberation, which you were speaking, held by the Council of State on this manifesto?
"A. I do not remember if he was present.
"Q. Did you see him on that occasion?
"A. I do not remember if he was present, how could I see him?

* * * * * * *

"Q. Do you know if Mr. Madrigal was present on the occasion of the signing of this manifesto, Exhibits O and O–2?
"A. He could have been present. But I do not remember.
"Q. You cannot be positive about that?

"A. I cannot be positive about that because I thought everybody was present one time and I was testifying to that effect, but later on I found that someone was not present and did not sign.

* * * * * * *

"Q. Did you see Mr. Madrigal sign this manifesto?

"A. I do not remember having seen him sign it." (Pp. 364, 365, n. t.)

Por su parte, el testigo Formoso basándose en las minutas Exhíbitos U–4, U–5, U–6 y U–7, manifesto que el acusado estaba presente tanto en las deliberaciones como en el acto de la firma del "Manifesto."

También se presentó como parte de las pruebas en apoyo de este cargo los Exhíbitos O y O–2, El Tribunal ha rechazado el Exhíbit O que es una copia fotográfica del "Manifesto" aunque ha admitido como un acto oficial el Exhíbit O–2 que es el mismo "Manifesto" publicado en la *Gaceta Oficial* correspondiente al mes de febrero de 1943 (Tomo 2, No. 2, pp. 144–145).

Como se ve, los testigos De Jesús, Zamora y Sychangco no hicieron ninguna manifestación categórica sobre la supuesta participación del acusado tanto en las deliberaciones como en el acto de la firma del "Manifesto." El único que dijo que el acusado tomó parte en estos actos fué el testigo Formoso, pero este testigo sólo se limitó en lo que aparece en las minutas Exhíbitos U–4 al U–7 inclusive, lo cual a juicio del Tribunal, tiene poco valor probatorio. Pero aun cuando se aceptase lo declarado por el testigo Formoso, no estando corroborado por ningún otro testigo, su testimonio no es suficiente para sostener lo que se alega en el cargo No. 3. Tampoco son pruebas suficientes los Exhibitos O y O–2 para demostrar que el acusado fué uno de los firmantes del "Manifesto" porque dichos documentos no son las mejores pruebas para probar dicho acto.

Y en cuanto al cargo No. 5 en el que se atríbuye al acusado de haber reasumido y continuado con la operación de la Canlubang Sugar Estate, con el propósito de ayudar y socorrer con sus productos de azúcar y alcohol a las fuerzas imperiales japonesas, y conjuntamente después con la Mitsui Bussan Kaisha, y últimamente el haber vendido el acusado su participación en dicho Canlubang Sugar Estate a Nanyo Kohatzu (South Sea Development Company), una agencia organizada por el enemigo, las pruebas del Ministerio Fiscal consistieron en los testimonios de Hans Juergen Rothkrick, Florentino Reyes, Felipe Cortes y Benito Razón (examen condicional que hizo suya la acusación), y los Exhíbits A, B, C, D, D–1, S–2, S–3, S–4, S–5, S–6, S–7, S–10, S–11, S–13, S–14, S–15, S–17, S–18, S–20, S–21, S–22, S–23, S–24, S–25, S–26, S–27, S–30, S–36, S–40 y S–41.

De las declaraciones de Hans Juergen Rothkrick y Benito Razón resulta que el acusado Vicente Madrigal el agosto 1, 1941, compró de sus dueños americanos las propiedades de la Calamba Sugar Estate, Inc., situadas en Calamba, Laguna, cambiándola por Canlubang Sugar Estate, Inc., por la suma de ₱5,500,000 de la cual solamente llegó a pagar ₱500,000 por haber sobrevenido la guerra; que desde entonces fué nombrado por el acusado dicho Benito Razón, a quien previamente se había encomendado el estudio para dicha adquisición, gerente general de dicha Canlubang Sugar Estate, Inc., con poderes amplios menos el de vender las propiedades o parte de ellos; que ha continuado funcionando dicho Canlubang Sugar Estate, Inc., siendo su principal producción azúcar y alcohol, hasta la llegada de las fuerzas japonesas en que se suspendió dicha operación; que dicho Benito Razón solicitó y obtuvo de las autoridades japonesas autorización para reanudarla, que comenzó a fines de enero de 1942 (Exhibits A y B, carta de Benito Razón al Comandante de las Fuerzas Imperiales Japonesas de ocupación en Calamba, Laguna, fechada enero 6, 1942, contestación de Saburo Watanabe, Chief of Staff, and Defense Commanding Officer-in-Chief of Greater Manila, de fecha enero 9, 1942, respectivamente); que al principio se vendía el azúcar sin limitación alguna mayormente a filipinos, y a japoneses como la O'Racca Candy Factory, Daido Bussan Kaisha, Mitsui Bussan Kaisha, Furukawa Plantation Co. y Cotton Co. District of Calamba, además de lo que se adquirían por el Garrison Commander Japonés de Calamba, el District Commander de Lipa, Batangas y el Navy Detachment de Cavite, pero se ordenó después por la Administración Militar Japonesa su venta al por mayor mediante el "quota system" a los autorizados compradores, y respecto al alcohol se entregaba a la Manila Liquid Fuel Distributing Union, una agencia de la Administración Militar Japonesa, y solamente podía reservarse la Canlubang Sugar Estate para su propio uso. Hacia el abril de 1942 se formó, para la operación de la Canlubang Sugar Estate, un fideicomiso (trusteeship), por orden de la Administración Militar Japonesa, entre Vicente Madrigal y Mitsui Bussan Kaisha, representados por Benito Razón y M. Kitajima, respectivamente, habiendo éste asignado en la Canlubang Sugar Estate a Shohachi Sinsaki (Exhíbit C, carta de introducción fechada abril 30, 1942, de dicha Philippine Liquid Fuel Distributing Union, y los Exhíbitos D y D–1, manuscrito y copia a maquinilla de la comunicación del Director General Japonés, fechada abril 14, 1942, a Vicente Ma-

drigal y M. Kitajima, para encargarse provisionalmente de la operación de la Canlubang Sugar Estate, Inc., en representación de la Armada Imperial Japonesa, con la adjunta Hoja de condiciones), y dicho Shinsaki quien de hecho decidía la administración de dicha Canlubang Sugar Estate, y durante dicho "joint trusteeship," como se hacía anteriormente, el azúcar se vendía bajo el mismo sistema de quota system" y el alcohol, con la misma reserva para el consumo de la Canlubang Sugar Estate, se llevaba a la Philippine Liquid Fuel Distributing Union. Y por el mes de abril de 1943 por orden de la Administración Militar Japonesa se encomendó a Nanyo Kohatzu la operación de la Canlubang Sugar Estate, nombrándose a Takahasi como gerente, con la dimisión de dicho Benito Razón.

Qué intervención, si la hubo, ha tenido el acusado en la reapertura de la Canlubang Sugar Estate? En este respecto dicho Benito Razón declaró:

"Q. After the Japanese entered Manila and you returned to the Canlubang Sugar Estate sometime in the early part of January, it is a fact that, in your capacity as manager of Mr. Madrigal there, you started negotiation with the Japanese for the resumption of the operation of the Company?

"A. Yes, sir. I tried to secure the permission first from the commander of the garrison in Canlubang. The head of the garrison indicated to me to see the authorities in Manila. It was then when I went to Colonel Watanabe who granted me the permission.

"Q. When you started the negotiation or took steps for the resumption of the operation of the company, naturally Mr. Madrigal knew about that and he was agreeable to it?

"A. Yes, sir, I presumed he knew though I did not consult him." (Pp. 34–35, n. t., examen condicional.)

* * * * * * *

"Q. In negotiating for the operation of the Canlubang Sugar State after the occupation of the Philippines by the Japanese, were you acting in your capacity as manager of the Canlubang Sugar Estate or as representative of Mr. Madrigal as an individual?

"A. Well, on that occasion I assumed a wider representation. What I meant is that I considered myself as general manager of the company and as such the representative of Mr. Madrigal and also the representative of about 12,000 people depending directly from the Canlubang Sugar Estate operation for their living." (Pp. 50–51, n. t., exámen condicional.)

La formación del "joint trusteeship" por Vicente Madrigal y Mitsui Bussan Kaisha de la Canlubang Sugar Estate, según declaró Rothkrick que había sido investigado por militares japoneses (págs. 65–68, n. t.) se debió a que habiendo el acusado solamente pagado ₱500,000 por la adquisición de la Calamba Sugar Estate, gran porción de las propiedades de la Canlubang Sugar Estate pertenecían a los americanos.

En que consistía dicho fideicomiso de la Canlubang Sugar Estate, dicho Benito Razon declaró:

"Q. Going to the formation of the trusteeship of the Canlubang Sugar Estate which started from about April 1942, do we understand that the trusteeship consisted of a point management of the company between Mr. Madrigal on one hand and the Japanese on the other?

"A. Well, if it were with other kind of people, I should say yes that would have been clear but I never was able to determine what kind of an organization it was because Mr. Kitajima, the manager of the Mitsui, and Mr. Madrigal were the two trustees. I was supposed to be Mr. Madrigal's representative in Canlubang and the Mitsui's sent one of its employees to be the representative of Mr. Kitajima in Canlubang but I was told that I would continue as the manager." (Págs. 40–41, n. t., exámen condicional.)

* * * * * * *

"Q. While this trusteeship was in operation, what actual share did Mr. Madrigal or you have in the management of the estate?

"A. Mr. Madrigal was supposed to be a trustee and that trusteeship was to decide on the policies to be followed but there was very little policy to determine in the sugar central; all you have to do is plant cane and mill it and get sugar. In my case, I continued as the general manager but of course I was being told in matters that affect the relations between the company and the outsiders, for example, the selling of sugar and alcohol." (Pág. ..... n. t., exámen condicional.)

Se han ofrecido por la acusación y admitidos por el Tribunal como parte de las declaraciones de los testigos Florentino Reyes y Felipe Cortes 25 cheques de la Yokohama Specie Bank por distintas denominaciones y fechas que cubren del mayo 29, 1942 al abril 13, 1944, y son: los expedidos a favor de la Canlubang Sugar Estate, Inc., Exhíbitos S–2, S–14 y S–22, por Takahashi & Co.; Exhíbito S–3, por The Del Carmen Sugar Co.; Exhíbitos S–4, S–5, S–6, S–7 y S–13, por Philippine Liquid Fuel Distributing Union; y Exhíbitos S–15 y S–21, por Osaka Boeki Kaisha, Inc., los expedidos a favor de Madrigal & Co., Exhíbitos S–10, S–11, S–23, S–24, S–25, S–26, S–27, S–30 y S–36, por Philippine Fuel Distributing Union; los Exhíbitos S–17, S-18 y S-20, por O'Racca Confectionery & Co.; y a favor de Vicente Madrigal, los Exhíbitos S-40 y S-41, libradas por una firma escrita en japones. Dicho Florentino Reyes que era chief clerk de la Chartered Bank of India, China y Australia, identificó las firmas que aparecen en el dorso de dichos cheques como del acusado, por estar familiarizado con la firma de Vicente Madrigal por las transacciones de éste con dicho Banco, y Felipe Cortes, que como bookkeeper que fué del Yokohama Specie Bank, conoce los cheques, Exhíbitos E–30 y S–40 y que las cantidades que aparecen en los mismos los debitó a cuenta de sus libradores en los libros de dicho Banco.

De las pruebas sobre este cargo, como quedan expuestas, el Juzgado encuentra que el acusado no tuvo ninguna intervención con la reapertura de la Canlubang Sugar Estate, y Benito Razon obró por su propia iniciativa y responsabilidad y fuera de los poderes a el conferidos como gerente, porque si tal acto era criminoso, como se pretende, no le autorizaba infringir la ley. No aparece de las pruebas ninguna actuación del acusado respecto a su participación en el "trusteeship" de la Canlubang Sugar Estate. No se ha presentado tampoco ninguna prueba respecto a que negociaciones o transacciones representaban los cheques ya mencionados. Se pretende, sin embargo, que servían como prueba corroborativa de la participación del acusado, durante la ocupación japonesa, en la operación de la Canlubang Sugar Estate; pero suponiendo que habían sido librados en pago del alcohol y azúcar los expedidos por la Philippine Liquid Fuel Distributing Union y O'Racca Factory Co., la mera aceptación de dichos cheques por el acusado, por este solo hecho, no constituye acto delictivo de traición por hallarse permitido por la ley (artículos 46, par. 2, y 52, par. 3, de la Convención de la Haya; y Artículo II, sección 3, de nuestra Constitución).

Por lo demás, no se han cumplido por las pruebas de la acusación la exigencia de la declaración de dos testigos para sustanciar, de acuerdo con la ley, los actos de ejecución alegados en la querella en esta causa.

No hay pruebas en autos respecto a la alegada venta del acusado de su participación en la Canlubang Sugar Estate a favor de Nanyo Kohatzu.

Por las consideraciones expuestas, no habiéndose establecido por las pruebas de la acusación ningún "overt act" de los alegados en los cargos 1, 2, 3 y 5 de la querella, por la presente se estima la petición de sobreseimiento formulada por la defensa, y se sobresee esta causa, con las costas de oficio. Queda cancelada la fianza prestada por el acusado.

Así se ordena.

Manila, Filipinas, 19 de julio de 1947.

JOSÉ P. VELUZ
Juez Asociado

RAMON R. SAN JOSÉ
Juez Asociado

LOPEZ, *J.*, concurring:

The evidence presented by the prosecution does not meet the requirements of the two-witness rule. This principle is rigid and exacting. The law provides:

"No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on

confession in open Court." This provision in our Treason Law was taken verbatim from Article III, section 3, of the American Constitution. The evidence for the prosecution in treason cases must satisfy this rule or there can be no conviction.

The crime of treason consists of two elements: adherence to the enemy and rendering him aid and comfort. Before there can be conviction, it must be proved that the accused not only must intend the act, but he must intend to betray his country by means of the act.

Adherence to the enemy, *in the sense of a disloyal state* of *mind,* is not required to be proved by testimony of two witnesses. Facts, which are not acts, may be proved in accordance with the ordinary rules of evidence.

But an overt act of the accused, whether it is an overt act of treason or a mere act showing adherence, must be proved by the testimony of two witnesses. "The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single witness." (Cramer *vs.* The United States.) If the act to be proved is an act of the accused, and it is an act from which may be drawn inferences that aid and comfort have been given, that act must be proved by the testimony of two witnesses. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses." (Cramer *vs.* The United States.)

But the two-witness rule establishes merely the minimum of proof of incriminating acts, without which there can be no conviction. Once this minimum of evidence is established in accordance with statutory requirements, the two-witness principle does not exclude the presentation of corroborative or cumulative evidence of any admissible character, either to strengthen a direct case or to rebut the testimony or inferences in behalf of the accused.

The two-witness rule, as interpreted by the Supreme Court of the United States in the Cramer case, may be stated in simple terms thus: whether the purpose of the prosecution is to show adherence alone or an overt act of treason, if it is an act of the accused that is to be proved, the act must be shown by the testimony of two witnesses. Cumulative or corroborative evidence of any admissible character may be presented to strengthen the case against the accused, but no amount of documentary evidence, expert testimony, or circumstantial evidence, however strong, will cure the lack of this fundamental requirement. This is the rule laid down by the Supreme Court in the

recent case of the People of the Philippines *vs.* Apolinar Adriano (G. R. No. 477).

I agree with my colleagues in their analysis of the evidence presented in this case and in the conclusions they have reached. In the light of the two-witness rule, it is quite clear that the evidence for the prosecution does not meet the statutory requirement.

Even in the supposition that the Treason Law was in full force and effect during the occupation and that the alleged overt acts against the accused were treasonous, the case against him must be dismissed for insufficiency of evidence under the two-witness principle.

Manila, Philippines, July 22, 1947.

EUSEBIO M. LOPEZ
Associate Judge

DECISIONS OF THE CIVIL SERVICE BOARD OF APPEALS

[Case No. 1.]

FEDERICO DAVID, Respondent-Appelant

DECISION

The charge against Federico David, Acting Chief Supervising Auditor, General Auditing Office, Manila, is contained in a report submitted to the Honorable, the Secretary of Finance, dated December 20, 1946, by the chief of the Secretary Service Unit of the Department of Finance, the pertinent parts of which read as follows:

"Yesterday, December 19, 1946, we caught Federico David, 56, chief of the property inspection section of the general auditing office and member of the accounting committee entrusted with the work of burning condemned government notes, with ₱15,010 in his possession, a part of the ₱6,000,000 condemned notes to be burned at the San Lazaro crematory. * * *"

"On December 2, 1946, Undersecretary Llamado informed the undersigned that he received a very confidential information that David had been acting queerly at every burning day of perforated condemned money at the crematory. The undersigned immediately contacted this informer and plans were laid to catch David, if ever he does anything wrong at the next crematory day."

"Yesterday, ₱6,000,000 worth of mutilated Treasury certificates was taken to the San Lazaro crematory to be burned. The undersigned and two of my agents went to the burning site earlier than the members of the committee and other representatives to burn the notes. Following up our plan, I had agent Duran cover the south door and agent Bejasa cover the north door of the main crematory building."

"David arrived with another representative from the General Auditing Office. At about 10:00 the members of the representatives, including the undersigned for the Department of Finance, began checking the number and tags of the bags in accordance with the list furnished us by the accounting committee. After our verification, we poured out the contents of the bags and the members of the committee, including David, untied the bundles and mixed them on the floor before shoving them into the oven. All this time, while I was pretending to be busy with all these processes, I had been closely observing David. As a matter of fact, it was at this period of work that David, while himself untying some bundles of notes, did filch some and put some into his pocket. Before I saw him pocketting, however, I had already been assured by my informer inside the building that David had already put some bundles of bills into his portfolio. From then on I kept a close watch on him."

"Since the burning of these notes would take some hours to finish and since it was already noon, half of the men that were there, left to eat. David did not go with the first group and I remained with him. Before the return of this group, however, David picked up his portfolio and tried to leave, taking the south exit of the main crematory building. I followed him close enough and as soon as he was out, I signalled Duran to meet him. Whereupon Duran approached David. When Duran was quite near him, I called David back and told him that in the name of the law he was under arrest. He just looked at me ignoringly and continued his way. Duran, therefore, confronted him and told him that he was under arrest. I was standing behind David and almost in consonance with Duran, I informed David that we were Department of Finance agents and were under order to search and arrest him. Simultaneously, Duran flashed his badge to David to show his authority, but David ignored him. I, therefore, held David's arm at the back and requested Duran to search him for any arm he might had. David did not like this and with a full force he jerked me away and pushed Duran. Duran and I grappled with David for quite sometimes, but he was really hard to subdue because of his size. Duran, at last, drew his pistol and threatened David to surrender. Not heeding this warning and my pleading that he surrender he instead tried to reach for Duran's gun. We grappled again. In the melee Duran's gun went off hiting David in his leg. Hearing a gun fire, Bejasa who was then covering the north exit ran to us and helped us subdue David. It was only now that David gave up his fight.'

"From David's pocket were found ₱6,000 perforated bills and in his portfolio, ₱9,010."

Found guilty by the Commissioner of Civil Service, and ordered dismissed for cause effective December 20, 1946, the date of his suspension, David now appeals to this board and raises the following questions:

"1. That I did not have an opportunity to defend myself in the administrative case; and

"2. That decision on the administrative case depends solely on my acquittal or conviction in the criminal case."

As regards the first question raised, there cannot be any doubt that Mr. David had had all the opportunity to defend himself, but

had chosen to waive it. In a letter of December 20, 1946, by the Auditor General to Mr. David, notifying him of his suspension from office effective that date, he was required to explain within 72 hours from the receipt thereof why no drastic administrative action should be taken against him. Replying thereto, in his letter of December 23, 1946, Mr. David requested for an extension of time to submit his explanation, which request was granted up to December 28, 1946, by the Auditor General in his letter of even date. Notwithstanding this grant of extension of time within which to submit his reply, Mr. David had not availed himself of this opportunity to submit any explanation in his defense up to April 1, 1947, when his case was decided by the Commissioner of Civil Service. The first contention is, therefore, clearly without merit and is overruled.

Referring to the second question, that the decision on the administrative case depends solely on his acquittal or conviction in the criminal case, this board wishes to reiterate and to affirm the long established principle that an administrative case against an official or employee of the Government is entirely distinct and separate from a criminal case filed in court although based on the same facts, and that the decision in the administrative case does not necessarily depend upon the result of the criminal case filed against the respondent in court. By the most approved opinion, administrative proceedings are regarded as an executive function and considered as remedial rather than penal in character, because the purpose of an administrative proceeding is not to punish the officer but to improve the public service; and the consequences of a conviction in administrative proceedings extend only to the possession of the office and its emoluments. It is for this reason that in a criminal case, a stronger proof is necessary to convict a person accused of a crime, the law requiring that the guilt of the accused be proven beyond reasonable doubt, while in an administrative case, all that the law requires is a moral conviction of the guilt of an official. The reason for this distinction is very clear. It is the punishment of an individual as a member of society that is sought in a criminal case, while what is sought in an administrative case is to improve the public service and to preserve the faith and confidence of the people in their government and its officials. That is why it has often been said that a government official or employee should not only be honest, but that he should appear to be so.

In view of the foregoing, the decision of the Commissioner of Civil Service dismissing Federico David from the service for cause, effective December 20, 1946, the date of his suspension, is hereby affirmed.

So ordered.

ROMAN OZAETA, *Chairman*
EMILIO ABELLO, *Member*
RUFINO LUNA, *Member*

[Case No. 2.]

MELQUIADES R. NATE, Respondent-Appellant

DECISION

The decision of the Commissioner of Civil Service from which Mr. Melquiades R. Nate, a clerk in the office of the District Engineer of Camarines Sur, appealed, contains the following statement of facts which we make as our own, the same having been found fully substantiated by the records:

"It appears that on September 13, 1946, the District Engineer requisitioned 36 cubic meters of sand and 18 cubic meters of stone at ₱3.50 per cubic meter or a total value of ₱189 from Mr. Ventura de la Cruz of Mabatobato, Pili, Camarines Sur. The said materials were accordingly delivered by the contractor. On October 10, 1946, a checker in the Office of the Provincial Auditor inspected the aforementioned materials and found them correct as to quantity and quality. On October 12, 1946, the voucher (D. E. Voucher 599) covering the materials requisitioned was signed by the Assistant Civil Engineer and duly approved by the District Engineer, after which the same was taken personally by the respondent to the Office of the Provincial Auditor. Upon verification at the latter office of said voucher, certain alterations in the figures were found; namely, 36 cubic meters of sand was changed to 56 cubic meters of sand, 18 cubic meters of stone was changed to 48 cubic meters of stone and the amount of ₱189 was changed to ₱364."

Before going into the merits of the case, it should here be stated that the respondent, Mr. Nate, was advised on March 29, 1947, of the decision of the Commissioner of Civil Service dated March 12, 1947, by the District Engineer of Camarines Sur, and the appeal of the respondent bears the date of May 15, 1947, and received by the Bureau of Civil Service on May 19, 1947. It is clear, therefore, that the appeal was filed with the Bu-

reau of Civil Service beyond the 30-day period prescribed in Commonwealth Act No. 598, for which reason this Board feels it has no jurisdiction to take cognizance of this case. But it may be stated herein, for the satisfaction of the respondent-appellant, that even if this Board takes cognizance of this case we have found nothing in the records, after a careful review of the same, to warrant a modification of the decision of the Commissioner of Civil Service. If the changes made by him were not discovered in time, he would have defrauded the government in the amount of ₱175, representing the difference in the value of the materials requisitioned and actually delivered and the amount stated in the voucher submitted for collection.

Wherefore, appeal from the decision dismissing the respondent, Melquiades R. Nate, from the service for cause, is hereby dismissed. Let a copy of this decision be furnished the Provincial Fiscal of Camarines Sur for prosecution, if the facts so warrant.

So ordered.

ROMAN OZAETA, *Chairman*
EMILIO ABELLO, *Member*
RUFINO LUNA, *Member*

[Case No. 3. July 17, 1947]

ISIDRO C. ANGANGCO, Respondent-Appellant

DECISION

This is an appeal filed by Mr. Isidro C. Angangco, acting chief appraiser of the Bureau of Customs, from the decision of the Commissioner of Civil Service dated December 5, 1946 considering him "resigned from the service effective at the close of business on August 24, 1946, the effective date of his preventive suspension from office, without prejudice to reinstatement in other bureaus of the Government."

The charges against respondent-appellant (Administrative case No. R–177) read as follows:

"1. That the respondent, Isidro C. Angangco, engaged in pernicious political activities before and during the national election on April 23, 1946.

"2. That respondent has practised favoritism and discrimination against other employees in the Appraisers' Division, especially in the assignment of dutiable entries to the various examiners.

"3. That respondent prepared and/or caused or authorized some of his subordinates to prepare in the office during office hours data which were used in the publication of the Philippine Customs Guide for personal gain, and that he solicited and/or authorized the soliciting of advertisements in said Guide from importers and brokers who have direct official dealings with him as Chief, Appraisers' Division, acts unbecoming a public official and prejudicial to the best interest of the government; and

"4. That respondent has committed, and is committing, immorality in that, being a married man, he is keeping a paramour with several children in a separate house."

The investigating committee of the Bureau of Customs found the respondent guilty of the four above listed charges and recommended his dismissal. The Commissioner of Civil Service, after a thorough review of the records of the case, found no evidence to substantiate charge No. 1 in connection with the charge of pernicious political activities, but found him guilty of "violation of regulations and of conduct prejudicial to the best interest of the service," in having made unauthorized collections from his subordinate personnel. He was likewise found guilty of negligence under charge No. 2 and of prejudicial conduct under charge No. 3.

Charge No. 1 is premised on the allegation that the respondent solicited monetary contributions from employees of his division and from a customs broker by the name of Maximo Barrios for the campaign fund of former President Osmeña in the last presidential election. The respondent admitted having initiated the collections which did not exceed ₱600, but alleged that such collections were for the benefit of orphans, widows and veterans of the last war and were solicited at the instance of Colonel Manuel T. Dikit of the Philippine-American Guerrilla through Major Wenceslao B. Santos of the same outfit, said collections having been subsequently returned to the respective contributors when the campaign for such fund was discontinued and given up. Colonel Dikit who personally testified before this Board corroborated the testimony of Major Santos affirming these allegations of the respondent.

This Board agrees with the Commissioner of Civil Service that charge No. 1 has not been substantiated. The collections referred to herein were not established as having been intended or actually destined for any political activity. On the other hand, the evidence affirms the allegation of the respondent-appellant that these collections were for charitable purposes and were subsequently returned to the contributors soon after the calling off of the campaign.

Political activity by civil service personnel is prohibited by established rules and regulations of the Government. This prohibition aims to preclude misuse of official position for partisan interest, and constitutes a safeguard against abuses in office. Certainly, the acts of Mr. Angangco in this case which are described above cannot be construed as electioneering or engaging in political activities.

This Board, however, observes that the uniform amount given by the employees in his division (₱20 from examiners and ₱10 from appraisers) robs the contributions of the element of voluntariness and gives ground for suspicion that said contributions were in the form of assessment to each employee in the Division. Moreover, in assessing these amounts from his employees, most of whom are receiving meager pay, he exploited their attachment to the office and directly or indirectly exercised official pressure on said employees to achieve his purpose. This Board considers this conduct of Mr. Angangco as improper and prejudicial to the best interests of the service.

Coming to charge No. 2 we found that there is no evidence to substantiate the same. On what is "favoritism and discrimination" founded? Certainly not on the fact that some were preferred for repeated assignments of dutiable entries. Were these people favored and the others who received a less number of assignments discriminated against? These questions have perplexed this Board for nowhere in the record of the case has it been shown that pecuniary benefits are derivable from these assignments, for to hold such favoritism and discrimination to exist is to admit that assignments of dutable entries in the Appraisers' Division of the Bureau of Customs carry with them some monetary benefits that should be distributed evenly among the personnel of the Division. The truth is that, excepting bare and unproved indirect reference to tips and other material considerations given by importers to examiners and appraisers in the Bureau of Customs as gleaned from the testimony of a secret service agent of the Bureau, no evidence has been adduced to show that such is the actual state of affairs, much less has there been any evidence directly or indirectly introduced in the investigation that would indicate that Mr. Angangco, in any way, derived pecuniary benefits from these assignments. The Board feels that to make the respondent-appellant responsible for this charge, evidence should have been presented that appraisers and examiners in the Bureau of Customs are actually receiving such tips and other forms of bribes, and that Mr. Angangco in assigning more dutiable entries to certain employees in his division actually received a cut or a share of the tips and bribe money. Inasmuch as the records are silent on this point, we are constrained to exonerate him from this charge.

In connection with charge No. 3, the testimony adduced in the investigation in respect to this charge is that Mr. Angangco was a co-author of the Philippine Customs Guide, a publication containing compilations of customs rules and regulations as well as pertinent provisions of the Tariff Act; that in the preparation of the materials for this publication Angangco utilized the services of the personnel during office hours as well as materials and supplies belonging to his division; that he took direct part in soliciting advertisements from parties such as importers and customs brokers, who by the very nature of their professions are constantly dealing with Angangco's division; and that Angangco did all these or caused them to be done without written permission of superior authorities of the Bureau.

The Commissioner of Civil Service found the explanation of Angangco in respect to these charges as unsatisfactory and therefore found him guilty of violation of regulations and of conduct prejudicial to the interest of the service. This finding is based on the fact that the respondent allowed the preparation of the data for the Guide during office hours and that advertisements were solicited from importers and brokers for insertion in said Guide with his knowledge and consent.

This Board agrees with the Commissioner of Civil Service that, viewed from considerations of proper official conduct Angangco has acted unduly, but these acts taken objectively are not as reprehensible as they appear to be. In the first place, the evidence shows that a greater portion of the rules and regulations of the Bureau of Customs were destroyed during the war, as a result of which the Division of Mr. Angangco was unable to supply daily requests for information along this line, indicating thereby the urgent need for reconstructing such lost records. In the second place, the publication of the Philippine Customs Guide was indirectly intended for filling this need, much more so when the manuscripts therefor were prepared by the personnel of the division, thus giving the latter opportunity to refresh their memories

on these vital rules and regulations which are daily consulted in the performance of their duties. In the third place, even if it is true that Angangco caused the solicitation of advertisements from importers and brokers, it was not so objectionable because such advertisers were given free copy of the publication and that what they paid for their advertisements was not gratuituos contributions so as to make them expect reciprocal benefits from the division with which they were in constant dealing. Moreover, the participation of the division of Mr. Angangco in said publication was verbally authorized by the Collector of Customs. Considered from this standpoint, Mr. Angangco is likewise exonerated from this charge.

Coming to charge No. 4, this Board agrees entirely with the following observations of the Commissioner of Civil Service relating to this charge:

"After a painstaking study of the evidence adduced in the investigation of the instant charge, this Office finds that the same is both insufficient and unsatisfactory to establish the charge. None of the witnesses presented could testify directly about the alleged immoral acts of the respondent. Exhibit J, which is an application to the NARIC for rice rations purportedly prepared and signed by Conchita N. Angangco, wherein the name of the respondent appears as her husband, as an evidence, has not probative value. In the first place, the same has not been identified by said Conchita N. Angangco; hence, it may be considered hearsay and selfserving. In the second place, said application is entirely at variance with the official copy, Exhibit 3 of the application for rice ration filed by said Mrs. Angangco with the NARIC.

"Likewise, Exhibit L which is a letter supposedly written by Milagros Martinez to the respondent and wherein the former addressed the latter as her 'father' does not in itself prove anything. It has not been identified by the alleged author thereof and besides the respondent denies the charge of immorality on this count. Wherefore, the respondent is hereby exonerated of the fourth charge."

In view of the foregoing, and taking into consideration the previous administrative cases filed against the same respondent for which he was found guilty of negligence of duty and was fined 15 days' pay in one case, and for laxity and gross negligence in the performance of his duties in another case for which he was punished with two months' suspension from duty, with the corresponding warning in both instances, the decision appealed from is hereby modified in the sense that the suspension undergone by him from August 24, 1946, to the date of the promulgation of this decision is hereby considered sufficient punishment, with warning that the commission of similar irregularities by him in the future will be more severely dealt with.

So ordered.

ROMAN OZAETA, *Chairman*
EMILIO ABELLO, *Member*
RUFINO LUNA, *Member*

APPOINTMENTS AND DESIGNATIONS

BY THE PRESIDENT OF THE PHILIPPINES

PUBLIC SERVICE COMMISSION

Hon. Gabriel P. Prieto, appointed ad interim Associate Commissioner of the Public Service Commission, June 27, 1947.

BUREAU OF INVESTIGATION

Joaquin Pardo de Tavera, designated Acting Director of the Bureau of Investigation, June 24, 1947.

REAL PROPERTY BOARD

Honorato Edaño, appointed chairman, and Tomas de Vera and Zoilo Castrillo, members of the Real Property Board, July 18, 1947.

PROVINCIAL BOARD OF TAX APPEALS

Ramon Balana, appointed ad interim member of the Board of Tax Appeals of the Province of Albay, June 24, 1947.

PEOPLE'S COURT

Hon. Alejandro Panlilio, appointed ad interim Associate Judge of the People's Court, July 15, 1947.

COURT OF INDUSTRIAL RELATIONS

Hon. Juan L. Lanting, appointed ad interim Associate Judge of the Court of Industrial Relations, July 22, 1947.

JUDGES

Hon. Edmundo Piccio, appointed Judge of the Twenty-first Judicial District, Branch I, Leyte. Confirmed by the Commission on Appointment, May 20, 1947.

Tereso M. Dosdos, appointed ad interim Judge of the municipal court of Cebu City, Second Branch, July 11, 1947.

PROVINCIAL FISCALS

Bernardo Teves, appointed ad interim provincial fiscal of Davao Province, June 18, 1947.

Jose L. Lagrimas, appointed ad interim provincial fiscal of Antique, June 18, 1947.

Luis N. de Leon, appointed provincial fiscal of Sorsogon. Confirmed by the Commission on Appointments, March 28, 1947.

Honorio Fulgencio, appointed ad interim assistant provincial fiscal of Samar, July 3, 1947.

Paterno Taclob, appointed ad interim assistant provincial fiscal of Misamis Occidental, July 10, 1947.

JUSTICES OF THE PEACE

Appointed ad interim justices of the peace:

Pastor Villamor of Carmen, Cebu, June 13, 1947.

Isabela Quibilan of Santa Lucia and Santa Cruz, Ilocos Sur, June 17, 1947.

Flaviano A. Bunag of Peñaranda and Papaya, Nueva Ecija, June 20, 1947.

Pedro C. Castañeda of Pantabangan, Nueva Ecija, June 23, 1947.

Efrain N. Gayares of Mati and Lupon, Province of Davao, June 25, 1947.

Otello Amunategui of Himalayan and Ilog, Negros Occidental, June 25, 1947.

Jose P. Castillo of San Juan, Batangas (auxiliary), July 1, 1947.

Emeterio Ocaya of Clarin and Tudela, Misamis Occidental, July 10, 1947.

Celerino Jumuwad of Alcantara, Cebu Province, July 11, 1947.

PROVINCES

Albay—

Francisco Sastre, appointed councilor of Libon, Albay, July 5, 1947.

Dionisio Celestial, appointed councilor of Malinao, Albay, July 19, 1947.

Bohol—

Jose M. Clarin, appointed mayor of Corella, Bohol, June 11, 1947.

Catalino Castillo, appointed vice-mayor of Tagbilaran, Bohol, July 19, 1947.

Bulacan—

Pablo Bautista, appointed vice-mayor of Hagonoy, Bulacan, July 19, 1947.

Cagayan—

Luis Rosacia, appointed vice-mayor of Gattaran, Cagayan, June 24, 1947.

Rafael Cenenon, appointed councilor of Gattaran, Cagayan, June 24, 1947.

Primitivo de Rivera, appointed councilor of Aparri, Cagayan, June 24, 1947.

Ignacio Pagalilauan, appointed councilor of Tuguegarao, Cagayan, July 19, 1947.

Camarines Sur—

Felix Pante, appointed councilor of Iriga, Camarines Sur, July 5, 1947.

Capiz—

Dominador Villareal, appointed councilor of Mambusao, Capiz, July 20, 1947.

Lorenzo Vestidas, appointed councilor of Jamindan, Capiz, July 20, 1947.

Cebu—

Severo Verallo, appointed mayor of Bogo, Cebu, July 3, 1947.

Juan J. Singco, appointed mayor of Ginatilan, Cebu, July 3, 1947.

Pedro D. Sepulveda, appointed mayor, Aniceto Gonzales, vice-mayor, and Eugenio Olivar, councilor of Danao, Cebu, July 5, 1947.

Florencio S. Rusiana, appointed vice-mayor and Arsenio Teves, councilor of Samboan, Cebu, June 24, 1947.

Mauricia A. Ybañez, appointed vice-mayor of Tabogon, Cebu, July 5, 1947.

Primo Borinaga, appointed councilor of Pilar, Cebu, July 5, 1947.

Eulogio Cortez, appointed councilor of Argao, Cebu, July 11, 1947.

Iloilo—

Marcial Santacera, appointed mayor, Maria G. Garingalao, vice-mayor, and Honorata A. Servento, councilor of San Joaquin, Iloilo, July 5, 1947.

Celso Tabobo Gellar, appointed vice-mayor, and Adriano Tabaosares, Vicente Tamonan, councilors of Tubungan, Iloilo, July 5, 1947.

Jovito Leagogo and Bonifacio Lasbañes, appointed councilors of Lambunao, Iloilo, July 5, 1947.

Isabela—

Domingo Allapitan and Genaro Managuelod, appointed councilors of Tumauini, Isabela, July 15, 1947.

Laguna—

Lucino E. Roasa, appointed vice-mayor and Venancio Estrellado, councilor of Luisiana, Laguna, July 5, 1947.

Graciano Aquino, appointed councilor of Lumban, Laguna, June 24, 1947.

Lanao—

Nicanor Halibas and Tangorac Marohom, appointed councilors of Iligan, Lanao, July 19, 1947.

La Union—

Fernando L. Cacdao, appointed councilor of Naguilian, La Union, July 5, 1947.

Leyte—

Fortunato Cabada, appointed vice-mayor of Babatñgon, Leyte, June 24, 1947.

Mindoro—

Basilio Villas, appointed councilor of Looc, Mindoro, July 21, 1947.

Angel Galicia, appointed councilor of San Jose, Mindoro, July 5, 1947.

Apolonio Francisco, appointed mayor of Pola, Mindoro, July 19, 1947.

Misamis Occidental—

Antero Hinagdanan, appointed vice-mayor of Misamis, Misamis Occidental, July 5, 1947.

Misamis Oriental—

Melanio Mandang, appointed councilor of Salay, Misamis Oriental, June 24, 1947.

Isidro Opeña, Rosendo Jose Sabuga, and Bernardo Labial, appointed councilors of Mambajao, Misamis Oriental, July 5, 1947.

Negros Oriental—

Victor Colong, appointed councilor of San Juan, Negros Oriental, July 5, 1947.

Pedro Infante, appointed councilor of Luzuriaga, Negros Oriental, July 5, 1947.

Nueva Ecija—

Romualdo Bautista, appointed councilor of Papaya, Nueva Ecija, July 9, 1947.

Nueva Vizcaya—

Macario D. Dadufalza, appointed mayor of Bayombong, Nueva Vizcaya, June 20, 1947.

Pangasinan—

Isabelo Carlas, appointed vice-mayor and Jose Gonatica, councilor of Santa Maria, Pangasinan, July 20, 1947.

Quezon—

Federico Barros, appointed councilor of Lopez, Quezon, July 19, 1947.

Romblon—

Gregorio Ibabao, appointed councilor of Badajoz, Romblon, July 19, 1947.

Samar—

Pedro Navarro, appointed mayor, Francisco Macato, vice-mayor, and Jose Zeta, Juan Macato, Maximo Cebu and Vicente Isanang, councilor of Talalora, Samar, July 12, 1947.

Zambales—

Segundo Dichoso, appointed vice-mayor and Florencio Espiritu, councilor of San Narciso, Zambales, June 24, 1947.

Zamboanga—

Regino Aniñon, appointed councilor of Katipunan, Zamboanga, July 20, 1947.

HISTORICAL PAPERS AND DOCUMENTS

Message of President Roxas, on the occasion of the Second Anniversary of the signing of the United Nations Charter on June 26, 1947:

The Second Anniversary of the signing of the United Nations Charter places once again in bold relief the situation of this still very much disturbed world. That historic covenant was the product of humanity's desire to unite all nations in mutual trust and understanding. We are a signatory to that pact together with 54 other nations. We have pledged our honor and our substance to the defense and perpetuation of the principles of the United Nations embodied in that great document.

As we grow in international stature we must gather inspiration from the noble task which was started years ago to bind all nations in the "Parliament of Man, the Federation of the World." Humanity's ideal is to have the war-drums throb no longer and the battle-flags furled forever.

The United Nations won the War. Let us fervently hope that they have also attained peace, a just peace for mankind, for all the years to come. Let us devoutly pray for that happy day when all peoples of the universe, regardless of creed and color, may assemble under one common flag of progress, understanding, and international amity. Only thus may there be happiness on this earth for all peoples.

Address of President Manuel Roxas, on the First Anniversary of the Philippine Republic on July 4, 1947:

MY COUNTRYMEN AND FRIENDS:

One year ago today we achieved our national independence and established the Republic of the Philippines. On this same spot, hallowed by the blood of Rizal and consecrated to his memory, the American flag was lowered and our flag, that glorious flag of our forefathers, was raised upon yonder masthead to wave thenceforth alone and unshadowed over all this land we love.

It is well that on each anniversary of that historic event we recall the significance of that symbolic ceremony, to remind us of the magnanimity of America and to awaken in our hearts a renewed devotion to freedom, a fresh determination to defend it with our lives.

We won our independence through the processes of democracy, by the will of a free people. We will scan

the pages of history in vain for another such example. In the past no star ever fell from an imperial diadem except through force and at the cost of torrents of human blood. It is to the undying credit of Americans and Filipinos that by trusting each other and having faith in one another, they cleared the way for the fullest cooperation in the consummation of the historic act we now commemorate—a priceless flowering of Christian civilization.

A new morality in the dealings of nations, particularly between dominant and subject peoples, was thus inaugurated. Liberty fluttered her wings and spread the glad tidings throughout the earth. It shook the foundations of empires and brought new hope to the benighted millions seeking to be free.

Now we may discern the effects of that transcendental event. Colonialism is crumbling rapidly everywhere. The right to independence is being recognized by all free and enlightened powers. The indivisibility of peace and liberty is being accepted. We know now that the world cannot long live at peace half slave and half free. Within a few months, following the pattern that we established, India will attain her freedom, Indonesia will gain her independence, Burma will be granted full sovereignty, and other subject nations will reach the same cherished goals.

It is true that there are forces at large in the world today striving to turn back the surging tide of freedom. But they will be of no avail, for the mighty concepts of liberty and justice that raised the victorious hosts in the last war are irresistible forces that no power however strong can permanently stem or subdue. The time is past when military might was the decisive factor in human struggles. Today the aroused conscience of free men, capable in time of need of creating overpowering instruments of war, is the mightiest force on earth. The Age of Reason has dawned!

We Filipinos can feel proud that we were actors in that historic drama that ushered in this new age. We are grateful to America for having kept faith with us and for pointing the way for other nations to follow in the trusteeship of the peoples under their flags.

In many quarters our independence was greeted with dark forebodings for our future. These predictions were not entirely unjustified. We had just emerged from a cruel war. Tens of thousands among the best of our youth were lost in the conflict. Our country was devastated, our economic system was destroyed, billions of our money had become worthless, social values had been dislocated, and even the morals of a large portion of our people had decayed through contact with a ruthless and Godless foe. During the three years of enemy occupation hundreds of thousands of Filipinos lived in defiance of the government and had lost respect for law. New ideologies had found lodgement in the minds of many of our countrymen as a revolt against the then prevailing economic and social conditions. Some had seemingly forgotten the virtues of democracy and had embraced the doctrine of class supremacy to be achieved through force. Our heroic veterans had returned to their homes in rags and were demanding the fulfillment of promises. Most of our people were bewildered and in want. There was general confusion; threats of revolution were whispered and even voiced openly from the public platform.

There was little to sustain us in our difficulties except our faith in ourselves. We promptly laid solid foundations for our Republic. We resolutely seized the instruments of sovereignty and quickly started to put our house in order. We fought a rear-guard action against the elements of chaos and disintegration and at the same time pushed forward to repair our shattered economy and institutions.

Now, look around you. Consider the adverse factors we had to face. Recall the painful experience of other nations that had to contend with problems such as ours at the inception of their independent existence. No nation in modern history, not even the United States of America, after its first twenty years of independence, could compare with us in the progress we have achieved in the first year of our Republic. Let no one sneer at this comparison; it is based on recorded facts. And the circumstances are essentially alike, for we are deal-

ing with practical human problems which are altered neither by the epoch nor the age in which they occurred. The relative values of all the factors involved are the same in every case.

It will also profit us to compare our situation with that which obtains today in all the countries of the world which had been occupied by the enemy during the last war. In those countries political and social unrest prevails. There is shortage of food and of other minimum requirements for decent existence. They are prostrate and in ruins. They are in the midstream of world events and are carried by the currents of power politics without capacity to hold fast to moorings of their choice. The Philippines, on the other hand, is truly master of its own destiny, is free from fear and want, and is actually solving satisfactorily its basic economic and social problems.

There is no desire on my part, I assure you, to indulge in self-adulation. Neither do I wish to induce you to believe that all that need be done has been done. But the truth is that we have made great progress in the face of tremendous odds.

The Government of the Republic has been fully organized. Its authority has been extended to the remotest nook and cranny of our land. We have been welcomed by the family of nations; we have been recognized by practically every government on earth. Our voice is heard in the United Nations and in many conferences on world affairs. We are participating financially and otherwise in the international instrumentalities created to restore rapidly the productive economy of the world. We are taking an active part in the efforts to build a new world order based on the freedom and equality of all nations, to insure a just and permanent peace and the welfare of all peoples.

Constitutional guarantees and the processes of a free government are firmly rooted in our soil. Our democracy is not a name but a fact. Our free institutions are in full operation. Human rights are being maintained and safeguarded. We have established an independent judiciary to stand sentinel for the preservation of those rights. Our people enjoy freedom of

speech and of the press, in a measure unsurpassed in any other country of the world. Here, the press or any individual may indulge in the bitterest criticisms against the government and its highest officials, without fear and without sanction. We uphold the right of every man to worship God as he pleases. We impose no limitattions on the freedom of thought or of conscience. The right of petition and the privilege of the people to gather and to exert efforts for the redress of grievances are never impugned. The sanctity of the home and the freedom from search and seizure are scrupulously defended. Free elections are guaranteed. But we also guarantee to suppress any and all attempts to gain through force or other illegal means any change in our system of government, or in the social order, or in the laws enacted by the representatives of the people. We adhere strictly to our democratic creed. We respect the sovereignty and the will of the people. We believe in a government by popular consent. We stand for liberty regulated by law. We abhor fascism and the methods employed by dictators, whether of the military or of a class. We have built a truly popular government subservient only to the popular will. A syndicalistic government or a communistic government, or a fascistic government—whatever its name—is contrary to our Constitution and our ideals, and will not be permitted to gain foothold on this free land.

The national economy is being gradually rehabilitated. In one year we have greatly increased the volume of our production. Although it has not yet reached pre-war levels, its monetary value today is more than three times the value of our total production income before the war. Government revenues have also greatly increased during the first year of our independence.

When the Republic was inaugurated, our revenues were barely ten per cent of our government expenditures. Now, they are six times greater, and at the present rate of collections, our revenues will cover about seventy per cent of our expenditures. I have great hopes that in the current fiscal year we shall be

able approximately to balance the expenses of government with revenues from taxation.

In this first year we have succeeded in reducing the cost of living by thirty per cent, notwithstanding a material increase in the money income of wage earners. We are enjoying a relative degree of prosperity, and the living standards of the people are higher.

More public schools have been opened; we have today over one million more children enrolled in the schools than before the war. Institutions of higher learning have increased in number and their attendance has more than doubled.

We have commenced the execution of a program for the redistribution of land in congested areas. This is the initial step leading to the ultimate abolition of an archaic tenancy system which ties human beings to a life of bondage on the land that they work and which their fathers before them had tilled, with little hope of social improvement. In the meantime we have granted to tenants a larger participation in the produce of rice-lands. We are rapidly getting back the valuable hemp, coconut and rubber plantations owned by enemy nationals and we have laid plans for the distribution of these lands among the veterans of the last war.

Our export trade is rapidly increasing and in money value is now much larger than before the war. Our destroyed industries are being reopened as fast as needed equipment can be procured. We have established a government institution to provide credit for speeding up the rehabilitation program. We have introduced more efficiency in the government service and we are firmly eradicating corruption and dishonesty among government officials.

Peace and order has been restored in practically every province and every town of our country. For the last three months no important disturbance of the peace by organized bands has occurred. The people have returned to their homes in the remotest barrios and are peacefully cultivating their lands. Common crimes are still frequent in a few localities, but these are being effectively dealt with, a fact which has resulted in a marked reduction of such crimes.

Our monetary situation is excellent. Inflation has been arrested and is under control. No country on earth, except the United States, has a more stable currency than ours. We maintain a hundred per cent reserve for our outstanding circulation. Because of the guaranteed convertibility of Philippine pesos in American dollars, our money is expendable anywhere in the world.

The public health is being duly safeguarded. We have prevented epidemics during the past year. A large number of government hospitals are now in operation. We are fighting malaria, tuberculosis and leprosy with the newest weapons to the limit of our resources.

A large public works program is now underway. We are rebuilding bridges, roads, portworks, schools, water systems and other government facilities. We have started the industrialization program, including the development of water power. Gold, coal, copper and other mines are being reopened. New industries are being planned and encouraged.

We have not neglected our obligations to our fighting men, nor those which we owe their widows and orphans. We are now assisting the crippled and the sick and the dependents of our dead soldier. The President of the United States has already urged the American Congress to pass suitable legislation granting to Filipino veterans the same privileges and gratuities accorded to American soldiers. Meantime we have approved a Bill of Rights for needy veterans and for the widows and orphans of our dead soldiers assuring them subsistence, educational and other benefits.

Despite the prophecies made before the elections that we would become a hopelessly divided people, we find today that the nation is more united than ever before in its history. Flushed with a noble pride in our sovereignty, our citizens are supporting the Republic and are cooperating in the rebuilding of our country without distinction of creed or section. We are loyal to one flag, one nation and one government.

By concluding a trade agreement with America we have practically a free market for all our products in the largest and most attractive market in the world. No

nation enjoys that privilege except ours. But despite this trade agreement, we are completely free to sell our products anywhere and to buy what we need from anywhere.

One of the first concerns of our Republic was our security. This we have met by entering into a military alliance with the United States for the mutual protection of America and the Philippines. During the present period of confusion and chaos in the world when dark clouds are again hovering over the horizon and an early war is being predicted by statesmen of many countries, we have every reason to rejoice that we have locked our destiny with the strongest and noblest nation of the earth. We must not risk another experience such as we had in the last war. We must insure ourselves against that danger. Our armed forces are being properly organized and equipped, and we have completed plans for the training of a citizen army on which we can rely in time of stress. The conclusion of a treaty allowing the United States to establish military and naval bases here is a signal achievement of our Republic.

Organized resistance to the government has practically ceased. The recalcitrant elements that instigated this treacherous movement have been dispersed. Their leaders are in hiding. I trust that by this time they have convinced themselves of the futility and the destructive effects of their undertaking. I hope that they will understand that my every attempt to dissuade them from pursuing their course is not to deprive them either of their rights or of their political influence, but rather to win their acceptance of the authority of the government established by their own countrymen, with the assurance that their rights to seek reforms in accordance with our democratic processes will be unhampered and unchecked. On this sacred day when every true patriot is celebrating the anniversary of the birth of our nation, I ask these dissidents again to return to the fold of the law and to enjoy the protection of our Constitution.

I have recited in broad lines the highlights of the achievements of our people and our Republic during the first year of its life. While many other nations are

wasting their substance in the struggle over new ideologies and the very problems of human existence, we are today well on the road of recovery and progress. While many other nations face revolutions and civil war, purges and military coups, we in the Philippines have left the causes of such conflicts far behind us. We are no longer disturbed by them. While in many other countries living conditions are still being regimented because of food and other shortages, here we have a free economy in actual operation. And we are not lacking in food or clothing, and our housing difficulties are gradually being eliminated.

The dire circumstances under which the people of other nations live today exist not only in the erstwhile enemy-occupied countries but even in many of the nations that took part in winning the war. Ask the world traveler who has visited these countries to compare the conditions there with the conditions prevailing here, and he will tell you without hesitation that our people should feel fortunate because of the freedom and prosperity that they enjoy and because of the government under which they live and work. I trust we shall be able to maintain these conditions and continue to improve them. We should work towards the establishment of an economic democracy in which all the people take part and every citizen derives a just and fair share of the fruits of the common effort. I have great faith that through intelligent and unremitting toil, free enterprise, and strong adherence to a democratic way of life, we shall succeed in making this Republic one of the few garden spots of the earth.

On this day sacred to us all, we should, as free men and true patriots, renew our pledge to serve our Republic and to labor for the enduring welfare and happiness of our people. The full sovereignty which we attained a year ago is still intact. We have not bartered away the smallest particle of that sovereignty for any material or other consideration. We should resolve to maintain that sovereignty in all its integrity, whatever the cost, so that we may continue to enjoy it to the fullest measure and bequeath it to our children, undiminished

and unsullied. In this resolve and in the task ahead to achieve the enduring happiness of the Filipino people, I call upon the whole nation to lend me its continued confidence and support. Given that, with the help of Almighty God, this Republic will, I am sure, rapidly grow in stature, wealth and power, loved and revered by its citizens, honored and respected abroad, the haven of liberty and justice, the cherished home of contented free men.

Address by Ambassador Carlos P. Romulo, Permanent Representative of the Philippines to the United Nations, at the Independence Day-Banquet and Ball held by the Filipino Community of the City of New York in Celebration of the First Anniversary of Philippine Independence, at the Waldorf-Astoria, July 4, 1947.

The anniversary we observe today is a two-fold one: it is in a manner of speaking, both a birthday and a wedding anniversary. The self-same hour that witnessed the glorious birth of the Republic of the Philippines witnessed also the solemn ritual of our people's indissoluble union with liberty.

This also is a double anniversary. It sheds its benign light with equal splendor on the American people and the Filipino people. It symbolizes their single victorious purpose in war as well as their resolute common purpose in peace. It holds for both the same joyous memory of fulfillment and the same inescapable challenge to vision and enterprise.

Anniversaries are for looking backward. They are for taking stock of the things we have done as well as of the things we have left undone, and we pause in our endeavors in order that we may measure our achievement by the yardstick of our original purpose.

But anniversaries are also for looking forward. They are for fixing the vision anew on the goal that lies ahead, and we pause in order that we may measure the distance we have to travel by the yardstick of our collective will.

I emphasize the sober mood of inventory far more than I do the inebriate sense of simple rejoicing and glory, and for a good reason. This, after all, is for the American people the one hundred and seventy-first anniversary of their independence, while it is only the first anniversary of our own. Americans can look back upon many long years of consistent and fruitful endeavor in freedom, and they can afford to rest, as it were, upon the laurels of wealth and power they have won. We, on the

other hand, have many long years of travel ahead of us, and we can ill afford to be distracted from our labors by any emotional excursions empty of content.

In observing this Fourth of July, we Filipinos have this significant advantage: that for our generation independence is much more than a mere memory hallowed by tradition and custom; it is, instead, a precious experience which we have lived and shared, and therefore a powerful source of direct encouragement and inspiration. Not by rote nor by the testimony of historians do we know that this indeed was the hour of our freedom, but rather by the personal knowledge of the vision we have pursued, the sacrifice we have borne, and the suffering we have endured. For us "the rockets' red glare" and "the bombs bursting in air" are matters of first-hand experience denoting Bataan and Corregidor, Leyte and Lingayen; and when we sing of beholding the radiance and feeling the throb of "glorious liberty," we know that the words have reference to something our own eyes have seen and our own hearts have felt. The quickened pulsation of the blood tells us better than any twice-told story of heroism the true meaning of independence.

In the mood of inventory to which I have already referred, I propose now to examine the true meaning which independence should hold for our people. I would say, first of all, that independence has become for the Filipino people an opportunity rather than a privilege, and that it implies moral obligations more than it assures juridical rights. While independence may appear to be a privilege to those who do not possess it, it is an opportunity to those who do. And those who do possess it shall make nothing of it until they realize that independence has positive value not as an end in itself but as a source of imperative moral duty.

In its narrowest sense, independence means living by one's own effort. However, in the world as we know it, independence of this sort is neither possible nor desirable. It is not possible for any nation, however rich or powerful, to live by itself alone, nor is it desirable that it should be so even if it could. It is an ancient tenet of religion that all men are brothers; it is an equally self-evident truth of modern science that all nations are neighbors. Yet neither religious tenet nor scientific truth has cancelled the essential merit of the ideal of independence: that every nation, like every man, must strive for a certain measure of freedom by being self-sufficient in the primary essentials of life, secure in the conditions of peace and order which make life supportable, and rich in the attributes of respect and dignity which make life worth living.

Measured by these tests, our young Republic may be said to have made remarkable progress in the brief span of one year. Rising from the wreckage of a destructive war, our people have wrestled with the problems of political reorganization, economic reconstruction, and social regeneration with high resolve and enthusiasm. The Government of the Republic is functioning on a sound constitutional basis. The will of the people continues to be expressed in periodic elections as provided by law. The basic civil liberties which are guaranteed to the citizen by the Bill of Rights are meticulously respected by the agencies of the State and by the courts. Freedom of speech, of the press, and of assembly remains unimpaired and is in fact upheld by the government under conditions which might have induced a less enlightened leadership to establish restrictive regulations or even punitive measures in the ostensible interest of peace and order. For the first time in nearly two decades there is in the Philippines today a real party of the opposition whose existence is generally recognized to be essential to any genuine form of representative government.

In the field of economic reconstruction, the most encouraging sign is to be found in the upward trend of productive enterprise. An impending rice famine has been averted by increased production of this staple cereal supplemented by imports from Siam and the United States. The production of copra has risen to pre-war levels, while the production of abaca, or Manila hemp, is now sixty per cent of the pre-war output. Crop loans to private producers and government-owned corporations devoted to the encouragement of the production of cereals and of the principal export commodities, including sugar, are certain to bring about a more speedy restoration of the national economy than was at first anticipated.

American financial and material assistance has been assured and is now being extended in accordance with the Philippine Trade Act and the Philippine Rehabilitation Act. This has made possible the initiation of a large-scale program of public works construction, including public buildings, schools and hospitals, railways, roads and bridges, post and telegraph offices, harbors and air navigation facilities, our weather observation and lighthouse service. Furthermore, our Government is now ready to resume the program of light industrialization which was rudely interrupted and set back by the war, including the reopening and expansion of cement and textile factories, sugar and oil mills and refineries, lumber mills and fertilizer plants, and the development of

water power. The acquisition of surplus property worth half a billion dollars has greatly facilitated the restoration of essential public services. In addition, the discussion of the Japanese reparations program has advanced to such a stage that the Philippines may soon confidently expect the transfer from Japan of a number of important industrial plants and equipment.

The entry of foreign investment capital, especially American capital, and the extension of American technological assistance are also assured under these enactments. At the same time, our Government, by establishing the Rehabilitation Finance Corporation and by assisting other banks and credit institutions, is giving every encouragement to Filipino citizens to apply their skills and talents to the exploitation of the country's natural resources.

The Philippine Government has secured budgetary loans from the United States which were needed to help tide the country over the current period of financial stringency. There are two things worth noting about these loans: first, that the state of utter economic prostration in which the Philippines found itself at the end of the war would have necessitated such loans whether the country were independent or not; and second, that the economic potentialities of the Philippines are such that these loans will be repaid as soon as the productive capacities of the nation can function normally and the system of tax collection is restored and reorganized. The United States has extended loans and outright gifts to various countries of the world, and I believe that Americans will agree with us when we say, quite candidly, that no country is better entitled to such assistance than the Philippines. At the same time, we also dare to affirm that few among these beneficiary states are in a better position to pay for every cent received than the Philippines. We wish to reassure the American people that these loans are gilt-edged investments guaranteed by collateral of the soundest character. The Filipino people, furthermore, consider them as investments in good will that will be repaid in full, with substantial interest, in kind. It is only necessary to add that the Philippines should be given sufficient time to settle these obligations—an extension of from three to five years, perhaps, to allow for the rehabilitation of productive enterprise.

The upward trend of the cost of living, which is a postwar economic malady not confined to severely devastated countries like the Philippines, has not only been arrested but shows encouraging signs of leveling down. Increased production will hasten this process. In the meantime, the Government has sought to relieve the tense agrarian

situation by the enactment of a new Tenancy Law providing for the unprecedented 70–30 crop-sharing plan; that is, 70 per cent for the tenant and 30 per cent for the landlord. The Government has also launched a new attack on the agrarian problem by purchasing private landed estates for redistribution to the farmers and by reviving the pre-war program of establishing agricultural settlements in new areas. In the field of labor-management relations, the Government has prevented or cut short several major strikes through mediation and arbitration by the Court of Industrial Relations, while at the same time permitting the growth of a labor movement that is more extensive and more vigorous than any existing in the Philippines before the war.

Despite its difficult financial position, the Philippine Government has accomplished prodigious feats of social regeneration. It has provided schooling for a greater number of Filipino children than before the war. It has distributed relief to the needy from UNRRA supplies and other foreign sources as well as from voluntary domestic contributions. It has reopened hospitals and public dispensaries throughout the country. It has approved a Veterans Bill of Rights under which a Veterans Board has been created to administer pensions, educational benefits, and hospital facilities to veterans, war widows and orphans. By persistent and effective representations to the American people and government, the administration has secured appropriate recognition and reward for our valiant guerrilla fighters, and stands an excellent chance of obtaining similar concessions for Filipino veterans of the USAFFE.

In reciting the efforts and achievements of the Government of the Republic during the first year of its existence, it is not my intention to ignore the shortcomings and difficulties, the entire complex of the multitudinous problems which continue to plague our people and Government today. There are serious problems of criminality and gangsterism, of graft and black marketeering, of shortages and inflation, of unemployment and low wages, of disease and deteriorating public health, of agrarian unrest and military operations against armed dissidents, of slow-moving treason trials and of insufficient faith in government. Though I will not attempt to gloss over these matters, I feel bound to declare that most of these criticisms are made in deliberate disregard of the facts which condition the existing situation. Foreign critics, but especially American critics, speak of the situation in the Philippines as if the country was not twice ravaged and laid waste in the space of four years,

as if the Filipino people were unscathed by the ruthless acts of a brutal occupation, indeed, as if the war that despoiled our country and people had been solely of our own making and responsibility. A sense of proportion would seem to dictate that conditions in the Philippines be viewed in the proper perspective and that the faults of government be considered against the background of the almonst total collapse and disorganization of Philippine life as the result of war. Without condoning instances of corruption or incompetence, such an attitude would give praise or blame as the facts require. Judgment would be tempered by sympathetic understanding, and a sick nation, no more than a sick man, would not be required to give a performance equal to that of one which is hale and sound.

The inadequacies of Philippine life today are not peculiar to the Philippines. Most countries have them in a greater or lesser degree, including those that suffered no direct physical or moral damage from the war. There is hardly any criticism now being leveled at the Philippines which cannot, with equal justice, be leveled also at the City of Chicago or the States of Mississippi or Missouri or South Carolina, and this latter without the partial justification which exists in the case of the Philippines. Furthermore, our critics would most certainly have a much sounder basis for judging the conditions in the Philippines today if they were to read up on the history of other countries—like the United States, for instance, on July 4, 1777—one year after their independence. They will find that the picture was nowhere pretty at any time—certainly not of the United States where there also was great insecurity of life and property and where there was a movement supported by respectable people to replace the Republic with a monarchy and make George Washington a king.

It is not my purpose to excuse the faults of our Government by citing the faults of another. My purpose rather is to show that we Filipinos are ourselves sharply aware of these deficiencies, and that our frank recognition of their existence is in itself a beneficent act of conscience which constitutes the first step in the process of healing. We know these shortcomings to exist, we do not avert our eyes from them, nor do we wish to conceal them from the eyes of others. We are confident that the conscience of the nation, reacting to every evidence of negligence or incompetence, corruption or abuse, will fashion the necessary remedies in accordance with our laws and constitution, and in the interest of a more perfect democracy.

For the things that have been accomplished so far, the credit goes, in the first instance, to the recognized leader of the Filipino people, President Manuel Roxas. A man of solid achievement in Philippine public life, trained almost from young manhood for the responsibilities of leadership, he has sought to put our nation on its feet by methods of self-help supplemented by every available assistance from the United States of America. Faithful to our country and our people, loyal to our Constitution and our laws, he has held before his vision, in admiration and a guiding star, the liberal, humane, and democratic institutions of American life.

This faith in America, this admiration for American institutions, account in great part for the strong pro-American orientation of our foreign policy. In a score of public addresses since his induction into office, President Roxas has underscored the fact that the Republic is, in his own words, "committed to the cause and international program of the United States of America," whose friendship is the "greatest ornament of our independence and raises us far above the level of our intrinsic power and prestige. "Such sentiments, one might add, come natural to a man who is one of the finest products of the American public school system in the Philippines, and who has served with courage and distinction under the American flag in defense of American ideals.

This spirit of intimate collaboration and alliance has already been enshrined in, and validated by a number of treaties and agreements. But over and above such written affirmations of common purpose are the sentiments of mutual faith, affection and gratitude which have outlived the moment of political separation and which are so deeply rooted in the minds and hearts of both our peoples that there shall be no need whatever of reducing them to the form of a polite diplomatic instrument. The Filipino people know, as the American people should know, that the independence of the Philippines was a historic act of mutual consent and consideration between two peoples, and that its ultimate success or failure will depend equally upon the capacity of the Filipinos and upon the willingness of the Americans to exhibit continuing evidences of their friendship and esteem.

Such evidences of improved relations between the Philippines and the United States have been of a most encouraging character. The relations between the American troops stationed in the Philippines and our civilian population have eased up considerably as a result of the sincere efforts of the authorities on both sides, specially Major General George F. Moore, to reduce or remove

the causes of friction. Even more heartening are the new proofs of generous consideration which the United States Government has shown in giving heed to the claims and grievances of our Filipino guerrillas and veterans of the USAFFE. The cloud of misunderstanding and resentment arising from the failure to give appropriate satisfaction to these grievances is fast lifting, and we have every hope of resolving all remaining issues in an atmosphere of mutual regard and consideration.

The commitment of our young Republic to the cause and international program of the United States of America has a wider implication than is apparent at first glance. That policy commits us with equal force to the cause of the United Nations of which the United States was one of the principal organizers and of which the Philippines is a loyal member in good faith and in good standing. We have, since San Francisco, given to the organization our full and ungrudging allegiance. By express will of our people and Government, we are pledged to continue giving our loyal support to the United Nations. We shall do so, not merely because it is our desire to honor our signature on the Charter. We shall do so because in our hearts we know that in the United Nations lies the last great hope of mankind—for peace and justice, for prospertiy and survival. More potent, in the end, than any aggregation of troops and armaments or system of fortifications or treaties of military alliance is the establishment of One World which shall stand as the bulwark of the security of all.

The independence of the Philippines has imposed another obligation of supreme importance upon the Filipinos. We were the first country in Asia to break through the wall of colonialism which had been built for centuries around that rich and populous region. We have a duty to lead the way, and to continue leading the way, until that wall is crumbled completely and all the oppressed and exploited nations are free. The President of the Philippines, realizing the historic responsibility of our people in this field, has expressed on various occasions his whole-hearted support of such a policy and has given me a special commission, in his official letter of instructions, to give it the most emphatic endorsement. Insofar as I personally shall have the opportunity and the power to give expression to this desire of our people, and to comply with the President's instructions, I shall endeavor by word and deed, in the councils of the United Nations or elsewhere, to support the legitimate aspirations of all peoples to freedom and independence. For I consider that it would be disgraceful for us Fili-

pinos, having won our freedom, to remain silent or to stand apart in selfish isolation while the anguished voices of our less fortunate brethren in Asia cry out for liberty.

I said, in the beginning, that it was my purpose to speak to you on this occasion in a mood of sober reflection. The nature of the work we have done as well as of the work we have yet to do certainly requires an attitude of honest self-examination. The nature and magnitude of the problems that beset our young Republic compel us to gather our forces anew for a supreme exertion of heart and mind and muscle. There must be no relaxation of effort. While yet the injuries of a long and bloody battle remain, we must face the challenge of another equally arduous and exhausting.

Though our Republic is young, our people are old in the endurance of battle and in the experience of suffering. The centuries of our history have taught us lessons in patience, in courage, and in determination to which no exhortation can add one jot of meaning. The future can place no burden upon us more onerous than we have borne in the past. A generation that, like ours, has already borne the crucifixion of the Japanese occupation can bear any responsibilities which the future may bring. We know the measure of our strength as a people, and by this strength we shall measure the remaining tasks that await us in buttressing our independence and in establishing upon a more stable foundation the Republic of the Philippines.

Posthumous award to Franklin Delano Roosevelt—The Medal of Honor for Chief Commander of the Philippine Legion of Honor:

CITATION

FRANKLIN DELANO ROOSEVELT, thirty-second President of the United States of America: For extraordinary, eminently meritorious and valuable services rendered in a position of great responsibility to the people and Government of the Philippines. In 1933, during his first term as President, Franklin Delano Roosevelt approved an Act of Congress establishing the Commonwealth Government and fixing the date of independence of the Philippines on July 4, 1946. For eight years thereafter, in the course of their preparation for independence, the Filipino people were greatly encouraged in their labors by the many evidences of his constant solicitude and sympathy. Ever thoughtful of the welfare of the Filipino people, he sought by every means in his power to bring the historic American experiment in the Philippines to a just and satisfactory conclusion. In December 1941, after the Japanese invasion, he

pledged the entire resources of the United States of America to the redemption of the Philippines. The Filipino people, believing in him and in the justice of their common cause with the American people, bitterly resisted the enemy during more than three years of unremitting struggle. Beginning in October 1944, and in the course of the next six months, the overwhelming might of American arms, supported by a loyal population, completely crushed the forces of the invader. Franklin Delano Roosevelt had kept his promise.

On this first anniversary of the Republic, the people and Government of the Philippines, in grateful recognition of his services, posthumously award to Franklin Delano Roosevelt—a great man, outstanding American, and hero of the Philippines—the Medal for Chief Commander of the Philippine Legion of Honor.

UNITED STATES OF AMERICA
PHILIPPINE ALIEN PROPERTY ADMINISTRATION

VESTING ORDER No. P–278

RE: RIVERSIDE PLANTATION COMPANY

Under the authority of the Trading with the Enemy Act, as amended, the Philippine Property Act of 1946, and Executive Order No. 9818, and pursuant to law, the undersigned, after investigation, finding:

1. That Fukuzo Nakama, Kenji Tezuka, Tosaku Tanaka and Izo Takayasu, subjects of Japan, whose present whereabouts are unknown but who are believed to be residents of Japan, are nationals of a designated enemy country (Japan);
2. That all of the capital stock (₱50,000) of Riverside Plantation Company, a corporation organized under the laws of the Philippines and a business enterprise within the Philippines, is owned by the persons described in paragraph 1 hereof and is evidence of control of Riverside Plantation Company;

and determining:

3. That Riverside Plantation Company is controlled by the persons described in paragraph 1 hereof, or are acting for or on behalf of a designated enemy country (Japan), or persons within such country and is a national of a designated enemy country (Japan);
4. That to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Japan);

And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

HEREBY VESTS in the Philippine Alien Property Administrator the entire capital stock of Riverside Plantation Company, more fully described in paragraph 2 hereof, together with all declared and unpaid dividends thereon, including all right, title and interest of whatsoever kind or nature of each and all other nationals, whomsoever they may be, of Germany and Japan in and to said property hereinbefore more fully described, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States in accordance with the provisions of the Trading with the Enemy Act, as amended, and the Philippine Property Act of 1946, and

HEREBY UNDERTAKES the direction, management, supervision and control of said business enterprise and all property of any nature whatsoever situated in the Philippines owned or controlled by, payable or deliverable to, or held on behalf of or on account of, or owing to, said business enterprise, to the extent deemed necessary or advisable from time to time by the Philippine Alien Property Administrator.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this Order may, within two years from the date hereof, or within such further time as may be allowed, file with the Philippine Alien Property Administrator on Form PAPA–1 a notice of claim, together with a request for a hearing thereon. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

Executed at Manila, Philippines, on August 4, 1947.

JAMES MCI. HENDERSON
Philippine Alien Property Administrator

Filed with the OFFICIAL GAZETTE on August 4, 1947, at 10:15 a. m.

VESTING ORDER No. P–279

RE: BANK ACCOUNTS OWNED BY J. KONRAD AND/OR WIFE

Under the authority of the Trading with the Enemy Act, as amended, the Philippine Property Act of 1946, and Executive Order No. 9818, and pursuant to law, the undersigned, after investigation, finding:

1. That J. Konrad and/or wife are citizens of Germany, whose whereabouts are unknown, and believed to be residents of Germany and nationals of a designated enemy country (Germany);